166-718

166-718

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~568~~ 245

I. R. PARSONS, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED MARCH 20, 1895.

(15,836.)

(15,836.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

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I. R. PARSONS, PLAINTIFF IN ERROR,

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the division number two of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1894, thereof, between The State of Missouri, appellee, and I. R. Parsons, appellant, in which case there was involved a Federal question, and its decision, to wit, that the facts therein disclosed that under the interstate-commerce clause of the Constitution, section 8, article one, the defendant therein was not required to have a license and the taxing of the defendant would be an attempt to regulate commerce between the States, and would be in contravention of the Federal Constitution and the Revised Statutes of Missouri, viz., sections 7218, 7211, 7212, and 7217, under which it was attempted to make appellant pay a license for selling proprietary medicines in the original packages when manufactured in another State and shipped in the State of Missouri, was in contravention of the Constitution of the United States, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from the date of signing the citation herein, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this sixteenth day of February, in the year of our Lord one thousand eight hundred and ninety-five.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

{ Seal of the United States Circuit Court, Western District of Missouri, Central Division. }

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by—

JAS. B. GANTT,
Presiding Judge.

1—563

1½ [Endorsed:] No. —. United States circuit court, western district of Missouri, central division. State of Missouri, defendant in error, *vs.* I. R. Parsons, plaintiff in error. Writ of error to the supreme court of the State of Missouri, division number two. Returned and filed Feb. 19, 1895. Jno. R. Green, clerk.

Return to Writ.

UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Seal of the Supreme Court of Missouri.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 25th day of February, A. D. 1895.

JNO. R. GREEN, *Clerk.*

2 The United States of America to The State of Missouri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., not exceeding thirty days from the date of signing this writ, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein I. R. Parsons is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James B. Gantt, presiding judge of division number two of the supreme court of the State of Missouri, this nineteenth day of February, in the year of our Lord one thousand eight hundred and ninety-five.

JAS. B. GANTT,
Presiding Judge.

2½ [Endorsed:] Supreme court of Missouri. State of Missouri, def't in error, *vs.* I. R. Parsons, pl'ff in error. Citation. Filed Feb. 19, 1895. Jno. R. Green, clerk.

UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

— hereby acknowledge due service of the within citation this 19th day of February, A. D. 1895.

R. F. WALKER,
Attorney for Defendant in Error.

3 In the Supreme Court of Missouri.

STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to wit, on the 10th day of April, 1894, there was filed in the supreme court of the State of Missouri a transcript from the Holt county circuit court, wherein The State of Missouri was respondent and I. R. Parsons was appellant; which said transcript was in words and figures as follows, viz:

STATE OF MISSOURI, } ss:
County of Holt, }

Pleas before the circuit court of Holt county at a term begun and holden in the city of Oregon, county and State aforesaid, on the 28th day of August, 1893, before the Honorable Cyrus A. Anthony, judge of the 4th judicial circuit of the State of Missouri, of which Holt county forms a part.

STATE OF MISSOURI, Plaintiff, }
against
I. R. PARSONS, Defendant. }

Be it remembered that heretofore, on the 14th day of July, 1893, it being in vacation of said court, the following, among other, proceedings were had and done, to wit:

STATE OF MISSOURI, Plaintiff, }
against
I. R. PARSONS, Defendant. }

4 At this 14th day of July, 1893, comes T. J. Wilkinson, one of the justices of the peace within and for Lewis township, in Holt county, Missouri, before the undersigned, clerk of the Holt circuit court, in vacation, and files a transcript of his docket and certain original papers in the above-entitled cause.

GOUV. MORRIS, *Clerk.*

Said transcript is in words and figures as follows:

STATE OF MISSOURI, Plaintiff, }
against
I. R. PARSONS, Defendant. }

Before Thomas J. Wilkinson, J. P. for Holt county, Missouri.

June 26th, 1893.—This day comes Charles Bartram, constable for Lewis township, and files his affidavit, charging the defendant with, at the county of Holt and State of Missouri, on or about the 26th day of June, 1893, peddling goods, wares, and medicines without having a license therefor. A warrant is issued and directed to the constable of Lewis township, made returnable forthwith, and now, to wit, on same day, the warrant issued returned executed by having the body of the defendant before me as ordered, and, by reason of the absence of the prosecuting attorney, the hearing of

this cause is continued to the 3rd day of July, 1893, the defendant entering into a recognizance for his appearance in the sum of fifty dollars, himself as principal and G. W. Quick as security.

July 3, 1893.—Come now the parties to this action, the defendant and his attorney, J. E. Craig; G. W. Murphy, prosecuting attorney, who files his information, informing the court that I. R. Parsons did then and there, on or about the 17th day of June, 1893, at
5 the county of Holt, deal as a peddler unlawfully and wrongfully by going about the country from place to place in a two-horse wagon selling certain goods, wares, and medicines without first having a license therefor, and did then and there offer for sale — to one J. R. Elder, against the peace and dignity of the State; and, further, the said G. W. Murphy, prosecuting attorney, informs the court that I. R. Parsons, at the said county of Holt, on the 17th day of June, 1893, did then and there unlawfully deal in selling goods and medicines as a peddler by going about from place to place to sell the same, and did then and there sell to one John R. Tochterman one bottle of medicine without having a license therefor or any other legal authority therefor; and, further, G. W. Murphy, prosecuting attorney, informs the court aforesaid that I. R. Parsons, at the said county of Holt, State aforesaid, on the 17th day of June, 1893, did then and there deal as a peddler by going about the country from place to place to sell various goods, wares, and medicines, then and there using a two-horse wagon for said purpose, and offer for sale certain medicines without having a license or other legal authority therefor; that the said I. R. Parsons did then and there offer for sale to one J. J. Nowles certain medicines as aforesaid, against the peace and dignity of the State. The defendant, having heard read the information, for plea thereto, says he is not guilty as charged.

The parties being ready for trial and neither party desiring a jury, the trial of the cause was submitted to the justice, who, after hearing the sworn statements of the witnesses and arguments of counsel, adjudges that the defendant, I. R. Parsons, is guilty as charged, and that he be adjudged to forfeit and pay to the
6 State of Missouri, for the use of the schools of Holt county, Missouri, the sum of fifty dollars, the penalty so assessed, together with the costs of this prosecution, $13.45, and that said defendant, I. R. Parsons, be confined in the jail of Holt county for a period of twenty-five days and until said fine and costs are paid, or be otherwise discharged by due course of law.

THOS. J. WILKINSON, *J. P.*

Comes now the defendant, on the same day, and files his affidavit for an appeal from our said judgment in this cause to the circuit court of Holt county, and says that the appeal is not made for vexation or delay, but that he is aggrieved by the judgment of the justice therein. The required bond, in the sum of one hundred dollars, is filed and approved and signed I. R. Parsons, C. M. Moser, and G. W. Quick, and the appeal is allowed as prayed.

THOS. J. WILKINSON, *J. P.*

The information filed before the justice of the peace is in words and figures as follows:

STATE OF MISSOURI, }
County of Holt, } *ss:*

THE STATE OF MISSOURI, Plaintiff, }
against
I. R. PARSONS, Defendant. }

Before Thomas J. Wilkinson, justice of the peace within and for the county of Holt, State of Missouri.

George Murphy, prosecuting attorney of Holt county, Missouri, informs Thos. J. Wilkinson, justice of the peace aforesaid, that I. R. Parsons, at the said county of Holt, on or about the
7 17th day of June, 1893, did then and there deal as a peddler unlawfully and wrongfully by going about in a two-horse wagon from place to place to sell certain goods—medicines and patent medicines—without first having or taking out a license therefor or having any other legal authority for the selling the same, and did then and there unlawfully offer for sale certain medicines to one J. R. Elder, against the peace and dignity of the State.

And George W. Murphy, prosecuting attorney aforesaid, informs Thos. J. Wilkinson, justice of the peace aforesaid, that I. R. Parsons, at the said county of Holt, on the 17th day of June, 1893, did then and there unlawfully and wrongfully deal in selling goods and medicines as a peddler by going about from place to place to sell the same as aforesaid, and did then and there sell to one John Tochterman one bottle of medicine without having a license therefor or any other authority for the same, said goods being not manufactured within this State, against the peace and dignity of the State.

And George W. Murphy, prosecuting attorney aforesaid, informs Thos. J. Wilkinson, justice of the peace aforesaid, that I. R. Parsons, at the said county of Holt, State aforesaid, on the 17th day of June, 1893, did then and there unlawfully deal as a peddler by going about from place to place to sell various goods, wares, and medicines (he then and there using a two-horse wagon for said purpose), and did then offer for sale certain medicines without taking out or having then and there a license or any legal authority for the same, and he, the said I. R. Parsons, did then and there offer for sale to one J. J. Nowles certain medicines as aforesaid, against the
8 peace and dignity of the State.

GEORGE W. MURPHY,
Prosecuting Attorney for Holt County, Missouri.

Said information is endorsed on the back as follows:

State of Missouri *vs.* I. R. Parsons. John Tochterman, J. R. Elder, J. J. Nowles. Filed July 3, 1893. Filed July 14, 1893. Gouv. Morris, circuit clerk.

STATE OF MISSOURI, } ss:
County of Holt, }

Be it remembered that at a regular term of the circuit court within and for Holt county, Missouri, begun and held at the court-house, in the city of Oregon, in said county, on Monday, the 28th day of August, 1893, at eleven o'clock a. m.—present, as officers of said court, Honorable Cyrus A. Anthony, judge; George W. Murphy, prosecuting attorney; Henry Cook, sheriff; Gouv. Morris, clerk, and Miss Tillie Gross, stenographer—when the following proceedings were had and done, viz:

Now comes Henry Cook, sheriff of Holt county, Missouri, with W. H. Sparks and James E. Cummins as deputies, who are sworn to return jurors at the present term of this court.

STATE OF MISSOURI, Plaintiff, }
against
I. R. PARSONS, Defendant. }

Comes now the prosecuting attorney on the part of the State, and comes also the defendant, in open court, in person and by his
9 attorney, and waives formal arraignment, and pleads "Not guilty." Whereupon, by order of the court, comes a jury herein, composed of twelve men, as follows, viz., Amer Crannell, Charles Anselment, J. H. Graham, William Keller, E. M. Norris, Silas Bucher, J. M. Wilson, Peter Wehrl, E. L. Gaffney, John Curtis, Preston Wise, and Jacob Bucher, who are sworn to well and truly try the cause now in hearing and a true verdict render according to the law and the evidence; and the said jurors having heard the evidence adduced in this cause, comes the defendant, by his attorney, and files his demurrer to the evidence herein, which demurrer, being by the court seen, heard, and considered, is by the court overruled; and the said jurors, being duly instructed by the court and having heard the arguments of counsel herein in full, by order of the court retire to consider their verdict.

Afterwards, to wit, on the 29th day of August, 1893, it being on the second day of the regular August term, 1893, of said court, the following further proceedings were had and done in said cause, to wit:

STATE OF MISSOURI, Plaintiff, }
against
I. R. PARSONS, Defendant. }

Comes now the prosecuting attorney on the part of the State, and comes also the defendant, in person and by his attorney, in open court; whereupon come the jurors and, all being present, return into open court the following verdict, to wit:

"We, the jury, find the defendant guilty as charged in the third count of the information, and assess his punishment at
10 a fine of fifty dollars."

AMER CRANNELL, *Foreman.*

Whereupon the said defendant, by his attorney, files his motion for a new trial of this cause, and files also his motion in arrest of the judgment herein.

And now, by the agreement of the parties hereto, said motions are by the court taken up and considered, and the court, being fully advised, doth overrule said motions. Wherefore it is considered, ordered, and adjudged by the court that the plaintiff, The State of Missouri, shall recover of and from said defendant the sum of fifty dollars for the use of the public-school fund of Holt county, Missouri, together with all costs in this cause laid out and expended, and that said defendant be confined in the county jail of Holt county, Missouri, until said fine and costs are paid, and that hereof execution issue to enforce this judgment.

Whereupon the defendant excepts to the ruling of the court in overruling said motions.

And now comes said defendant, in person and by his attorney, in open court and files his affidavit for an appeal from the judgment of this court to the supreme court of the State of Missouri, which affidavit is by the court taken up, examined, and considered, and the court, being fully advised in the premises, doth grant said appeal.

And afterwards, to wit, on the 4th day of September, 1893,
11 it being the 7th day of the regular August term of said court, the following further proceedings were had and done in said cause, viz:

STATE OF MISSOURI, Plaintiff,
against
I. R. PARSONS, Defendant.

Comes now the defendant, I. R. Parsons, as principal, and Robert Montgomery and Albert Roecker, as securities, and acknowledge themselves severally to owe and be indebted to the State of Missouri in the sum of one hundred and fifty dollars; for the payment of which, well and truly to be made, they jointly and severally bind themselves, their heirs, executors, administrators, and assigns, firmly by these presents.

The conditions of the above bond are such that if the bound defendant, I. R. Parsons, shall in his own proper person appear in the circuit court within and for Holt county, Missouri, at such time and place as directed by the supreme court of Missouri, and that he will render himself in execution and obey every order and judgment which shall be made in the premises, then the above bond shall be null and void; otherwise it shall remain and be in full force and virtue in law.

Afterwards, to wit, on the 9th day of September, 1893, it being on the 12th day of the regular August term of said court, the following further proceedings were had and done in said cause, to wit:

STATE OF MISSOURI, Plaintiff,
against
I. R. PARSONS, Defendant.

12 Now, here, at this time, by order of the court, defendant has leave to file his bill of exceptions in the above-entitled cause on or before the first day of the next term of this court.

STATE OF MISSOURI,
County of Holt, } *ss:*

Be it remembered that at a regular term of the circuit court within and for Holt county, Missouri, begun and holden at the court-house, in the city of Oregon, in said county, on Tuesday, the second day of January, 1894—present as officers of said court, Honorable Cyrus A. Anthony, judge; Henry Cook, sheriff; Gouv. Morris, clerk, and Miss Tillie Gross, stenographer—when the following proceedings were had and done, to wit:

STATE OF MISSOURI, Plaintiff,
against
I. R. PARSONS, Defendant.

Now, at this time, by agreement of the parties hereto and by order of the court, the time for filing bill of exceptions herein is extended to Monday, January 8, 1894.

Afterwards, to wit, on the 6th day of January, 1894, it being on the 5th day of the regular January term, 1894, of the said court, the following further proceedings were had and done in said cause, to wit:

STATE OF MISSOURI, Plaintiff,
against
I. R. PARSONS, Defendant.

13 Comes now the prosecuting attorney, on the part of the State, and comes also the defendant in person and by his attorney, in open court, and files his bill of exceptions in the above-entitled cause.

Said bill of exceptions is in words and figures as follows:

STATE OF MISSOURI, Plaintiff,
against
I. R. PARSONS, Defendant.

Be it remembered that on the 28th of August, 1893, the following proceedings were had:

On the part of the State, JOHN TOCHTERMAN, being duly sworn, on his oath states:

Q. Where do you live?
A. Four miles a little southwest of here.
Q. What county and State?
A. Holt county, State of Missouri.

Q. State whether or not you are acquainted with the defendant, R. J. Parsons.

A. I ain't not, only he came around the 17th of June with some medicine; that's all I know.

Q. You saw him on the 17th of June?

A. Yes, sir.

Q. What year?

A. 1893.

Q. State how he was traveling.

A. He had a two-horse rig*g*.

Q. What was he doing with the two-horse rig*g*?

A. He was going along the road.

Q. Did he drive up to your place?

A. Yes; he drove up and stopped.

14 Q. Did he have any business with you there?

A. No; he recommended that medicine.

Q. What medicine was it?

A. The Baker medicine.

Q. Did he make any trade with you?

A. Yes; we took a bottle on time, as we didn't have any money.

Q. Who do you mean by we?

A. He done business with my wife. I was there, but I was busy.

Q. Who would have to pay for it?

A. My wife; she promised to pay it; she took it.

Q. Did you ever see the defendant after that?

A. No; I ain't seen him.

Q. State in what county and State this occurred.

A. Holt county, State of Missouri.

Q. Did you buy any other medicine from him?

A. No; not that time.

Cross-examination by J. E. CRAIG:

Q. Where was it you saw Mr. Parsons first?

A. At our house.

Q. Drove up to your house?

A. Yes; he come to our house.

Q. Did he talk to you or her?

A. I stood close by.

Q. You heard what was said?

A. Yes, yes.

Q. What form was the medicine in?

A. It was in a bottle, wrapped up.

15 Q. Your wife took it with the wrapper on it?

A. Yes.

Q. Who paid for it?

A. My wife; she only promised to pay.

Q. That was all the bottle you got?

A. Yes; that was.

Q. Did Parsons say anything about the medicine, where it come from?
A. I don't remember whether he did.
Q. Tell—did it come from Keokuk, Iowa?
A. He said, traveling for the same house.
Q. Did he tell what company that was?
A. The Baker Company. He didn't mention the place.
Q. Did you know the place?
A. No; but I heard lots of times of it.
Q. You don't know the place yourself?
A. No, sir.

JOHN R. ELDER, being duly sworn on the part of the State, testified as follows:

Direct examination by Mr. MURPHY:

Q. In what county and State do you live?
A. County of Holt, State of Missouri.
Q. State whether or not you are acquainted with the defendant, Mr. Parsons.
A. Well, I saw him some time along in June.
Q. What time—what day?
A. Well, it was a little before the middle or about the middle, as well as I remember.
16 Q. What year?
A. '93.
Q. State whether or not he had business dealings that day with you.
A. Well, he came to my place and said he was representing the Baker Medicine Company. I told him we didn't want anything. I didn't take anything from him.
Q. How was he traveling?
A. He had a two-horse buggy or rig*g*.
Q. Did you ever see him before or after that around there?
A. No; I never seen him before that day. I saw him at Forest City after that, before the justice's court there; never saw him till that day.
Q. You say the day you saw him he asked whether you wanted any medicine or not. Did you go out to where he was?
A. He came up to the house. He had his horses down the hill. As I came down the hill I saw him drive over. He had a two-horse buggy.
Q. In what county and State was this?
A. Holt county and State of Missouri.
Q. About what time?
A. Some time about the middle of June.
Q. What year?
A. 1893.

Cross-examination by J. E CRAIG:

Q. Mr. Elder, he said he was representing the Baker Medicine Company?

A. Yes, sir; as well as I remember.

Q. Tell where they resided.

17 A. Well, I don't know, only that he said—of course I knew.

Q. Well, it was at Keokuk, Iowa. You knew he was representing the same company?

A. Well, he said he was.

Q. You didn't purchase any medicine of him?

—. ——.

JOSEPH KNOWLES, being duly sworn on the part of the State, testifies as follows:

Q. Where do you live?

A. Holt county, State of Missouri.

Q. State whether or not you have ever seen Mr. Parsons.

A. Yes, sir.

Q. When?

A. It was along in June some time.

Q. What time in June?

A. Why, along about the middle of June.

Q. What year?

A. 1893.

Q. State whether or not he had any business that day. Where was he when you saw him?

A. Why, he was in the public highway there, by my house.

Q. How was he traveling?

A. Two-horse rigg.

Q. What was he doing?

A. He said he was representing the Baker Medicine Company.

Q. Did he have any dealings with you or have further talk?

A. No, sir; we didn't buy anything of him.

Q. Did he offer to sell any?

18 A. No, sir; he never offered to sell anything.

Q. Just saying he represented the Baker Medicine Company—but he never offered to leave any?

A. Yes, sir.

Q. That's all you remember of him talking about?

A. Yes, sir.

Cross-examination by J. E. CRAIG:

Q. You say he said he was travelling for the Baker Medicine Company of Keokuk, Iowa?

A. He didn't say Keokuk, Iowa; he only said Baker Medicine Company.

Q. Did he say he had the medicine?

A. He didn't show no medicine.
Q. Nor offer?
A. I told him — didn't want any.

Redirect examination:

Q. Did he say he had the medicine?
A. Yes, sir. I told him we didn't want to buy any, so he drove ahead.

This was all the evidence produced on the part of the State. The defendant prayed the court at the time to instruct the jury that under the law and the evidence you will find the defendant not guilty; which instruction the court refused and the defendant at the time excepted.

I. R. PARSONS, defendant, being sworn on the part of the defendant, testifies as follows:

19 Q. Where do you reside?
A. My house?
Q. Yes, sir.
A. Mount Ayr, Iowa.
Q. What is your business?
A. Selling Baker medicine.
Q. Are you employed by the Baker Medicine Company?
A. Yes, sir.
Q. Where is the Baker Medicine Company?
A. Keokuk, Iowa.
Q. Examine that contract and state whether or not that is your signature (handing witness contract).
A. It is it.
Q. Is that the original contract made by Baker and Company with you?
A. That is the one—supposed to be the one.

(Contract is here offered in evidence.) Hereto attached and marked "Exhibit A."

Q. State, Mr. Parsons, how the medicine comes to you that you sell for S. F. Baker.
A. In the original package; the way they are put up by the company.
Q. Sell no other excepting in that form?
A. No, sir.
Q. You know S. F. Baker & Co. to be manufacturers in Iowa?
A. Yes sir.
Q. Do you know whether they have any place of business in the State of Missouri?
A. I don't know.

20 Cross-examination by Mr. MURPHY:

Q. Mr. Parsons, how many different kinds of medicine did you sell, condition powders?

(Objected to by Mr. Craig.)

Q. You stated to Mr. Craig that that medicine were just as you received them from the company. State if — is not a matter of fact they were in boxes then you received them.

A. Yes, sir.

Q. And didn't you sell them singly?

A. Yes, sir.

Redirect examination:

Q. Each package was wrapped up in its own separate wrapper?

A. Yes, sir.

Q. As the original put up in the house?

A. Yes, sir; they came by freight on the railroad.

Q. In a box?

A. Yes, sir.

(Objected to by Mr. Murphy.)

Q. Each package that you disposed of in the package, that was the original put up?

A. Yes, sir.

Recross-examination:

Q. How do you know that, Mr. Parsons?

A. I was there.

Q. Do you pretend to tell the jury they were put up in boxes? You told Mr. Craig here you sold them in the original package. You understood the meaning of the word original?

A. Yes, sir.

21 Q. Now, do you pretend to tell the jury that they were first made up in a box?

(Objected to as immaterial.)

J. E. CRAIG, being duly sworn, testifies on the part of the defendant as follows:

Statement.

I live in Keokuk, Iowa; practicing attorney there; have practiced there for the last fifteen years; know the S. F. Baker Medicine Company; have known them ever since I lived there. They are the manufacturers of medicine and they do business in no other place except in the city of Keokuk, Iowa; do business by traveling salesmen, and they ship their goods from their houses. They are shipped in bottles, as they are originally put up; boxed in boxes and sent company when called for.

This was all the evidence that was offered on the part of the defendant.

"EXHIBIT A."

This agreement made and entered into this seventh day of January, 1893, between S. F. Baker & Co. of Keokuk, county of Lee and State of Iowa party of the first part, and I. Ralph Parsons of Mr. Ayr county of Ringgold and State of Iowa party of the second part,

Witnesseth, that the said party of the second party in consideration of the sum of money hereinafter mentioned to be paid by the said party of the first part, covenants and agrees to diligently and faithfully employ himself for one full year's active service in distributing, selling and collecting for such medicines or goods
22 as are manufactured and sold by said party of the first part, in such States, and at such places in such States, as said party of the first part may direct, and honestly and promptly pay over to the said party of the first part, all moneys collected by him for their account (except as hereinafter provided) and to return to said party of the first part, all medicines, account book or books, receipts, or any papers or goods in his custody, pertaining to his agency, whenever demanded by said party of the first part; also the said party of the second part agrees to use his best exertions to make such distributions, sales and collections, under the directions of said party of the first part, and to make and forward correct reports of same as may be desired by and to said party of the first part, and to conduct the business of said party of the first part in every way to their best interest and as they may direct; and the terms of this contract shall remain in full force and effect until final settlement be had between the parties; said party of the second part is to furnish all necessary arrangements to carry medicines in and keep same dry, also is to furnish good horse or horses and wagon and tin sample box.

In consideration for which service and employment of him, the said party of the second part, the said party of the first part, covenants and agrees to pay him the sum of four hundred and twenty dollars, and such expenses as boarding for himself and horse or horses, freight on goods, postage and tollage (but no other) while in the employ of said party of the first part and the said party of the second part is to receive his pay monthly out of the cash sales of such medicines as he may carry, provided said party of the second part shall sell enough for cash to pay him this monthly al-
23 lowance and his travelling expenses, but if not, then the party of the second part is to receive the balance of his pay in full at the expiration of his year. And it is expressly agreed between the parties to this agreement, that if the party of the second part shall at any time before completing one full year's employment to the said party of the first part, quit such employment, or shall engage in any other employment, without the written consent of said party of the first part he shall receive only two-thirds of the salary for the time actually worked, one-third being allowed as liquidated damages for failure to complete the contract, and shall at once return to said party of the first part all medicines, books,

receipts, and other papers, or goods in his custody pertaining to his employment.

Temporary suspension of such employment on account of sickness of said party of the second part shall not operate as a forfeiture aforesaid provided said party of the second part shall, upon the restoration of his health, resume such employment so as to make one full year's active service. And Henry H. Parsons of Mount Ayr county of Ringgold and State of Iowa whose name appears as a party to this agreement, acknowledges himself, or herself, as security for the faithful performance by the said party of the second part of his covenants in this agreement contained and for the faithful accounting of all moneys collected by him on account of said party of the first part, and for the return of all medicines, books, papers and receipts in his custody pertaining to such employment, whenever demanded by said party of the first part, and it is agreed by and between parties of the first part, and said surety that any renewal of this contract, or the making of any new contract
24 with the party of the second part, shall not be a release of said surety for any liability incurred under this contract.

This and all other papers pertaining to this business performable at Keokuk, Iowa, or at Kahoka, Mo., as said party of the first part may at any time elect. In witness whereof the said parties have set their hands and seals the date first herein written.

I. RALPH PARSONS. [SEAL.]
HENRY H. PARSONS. [SEAL.]
S. F. BAKER & CO. [SEAL.]

STATE OF IOWA, } ss:
County of Ringgold, }

Henry H. Parsons, being duly sworn, deposes and says that he is the owner in fee-simple of real estate in this State described as follows: W. ½ of N. ½ of N. E. ¼ of section 18, T'p 67, R. 29, with incumbrance ($500.00), and lot 9 of S. 4 of E. ½ of N. W. ¼ of sec. 6, T'p 68, R. 29, containing one acre in irregular survey to Mt. Ayr, Iowa, with incumbrance of $200.00; total value of all property, $2,600.00, of the value of twenty-six hundred (2,600.00) dollars, unincumbered, subject to execution, and over and above 700 — indebtedness.

HENRY R. PARSONS.

Subscribed and sworn to before me, by Henry R. Parsons, this 9th day of January, A. D. 1893. Witness my hand and official seal.

[SEAL.] JESSE T. ROSE,
Notary Public.

I, Henry R. Parsons, do hereby give my consent to my son, I. Ralph Parsons, to contract as represented in this contract with S. F. Baker & Co. & son, of Keokuk, Iowa, and allow him to draw

his salary on same. Witness my hand the 9th day of January, 1893.

HENRY R. PARSONS.

I. R. Parsons, Jan. 7, 1893, $420.

25 Whereupon the plaintiff, by its attorney, prayed the court to instruct the jury as follows:

The jury are instructed that if they believe from the evidence that the defendant did, at the county of Holt and State of Missouri, on or about the 17th day of June, 1893, deal in the selling of medicine by going from place to place to sell the same; that he did then and there use a two-horse wagon for that purpose without then and there having a peddler's license permitting him so to do, you will find the defendant guilty as charged in the third count of the information and assess his penalty at a fine of fifty dollars.

The defendant is presumed to be innocent of the offense charged, and unless you believe from the evidence, and that beyond a reasonable doubt, that the State has established the guilt of the defendant as charged, you will acquit him, but a doubt to authorize an acquittal should be a substantial doubt of the defendant's guilt and not a mere probability of his innocence.

Which instructions the court gave to the jury; to the giving of which instructions in behalf of the plaintiff the defendant, by his counsel, then and there duly excepted.

The defendant then and there offered the following instructions and prayed the court to give the same, to wit:

Now comes defendant and demurs to the evidence:

1. Because the evidence fails to disclose facts sufficient to convict.

2. Because the facts disclose that under the interstate-commerce clause of the Constitution, sec. 8, article 1, the defendant is not required to have a license and a Federal question is in-

26 volved.

3. Because the State failed to prove that the defendant had no license.

Which instruction the court refused; to which refusal of instructions they prayes the defendant, by his counsel, duly excepted.

Under the instructions of the court, the jury returned a verdict of guilty, as follows:

"We, the jury, find the defendant guilty as charged on the third count of the information and assess his punishment at a fine of fifty dollars.

"AMER CRANNELL, *Foreman.*"

And on the 29th day of August, 1893, and within four days after the rendering of said verdict the defendant filed his motion for a new trial as follows:

In the Circuit Court of Holt County, Missouri.

STATE OF MISSOURI }
vs.
I. R. PARSONS. }

Before the Honorable Cyrus A. Anthony, judge.

Now comes defendant and moves the court for a new trial:

1. Because the verdict is contrary to the evidence.
2. Because the verdict is contrary to the law.
3. Because the court erred in giving instructions number- 1 and 2 for the State.
4. Because the court refused to instruct the jury to find for the defendant as asked by him.

27 5. Because the court refused to submit the Federal question involved.

J. E. CRAIG,
Attorney for Defendant.

And at the same time and immediately after filing the motion for a new trial the defendant filed his motion in arrest of judgment as follows:

STATE OF MISSOURI }
vs.
I. R. PARSONS. }

Now comes defendant and in arrest of judgment—

1. That the said judgment of the court be suspended for the following reasons:

1. Because the evidence failed to disclose facts sufficient to convict.
2. Because the plaintiff failed to prove that the defendant had no license.
3. Because the facts disclose that under the interstate-commerce clause of the Constitution, sec. 8, article 1, the defendant is not required to have a license, and the taxing of defendant would be attempting to regulate commerce between the States and would be in contravention of the Constitution.
4. Because the instructions of the court were not in accordance with the law and was error.

CRAIG, McCARRY AND CRAIG,
Attorneys for Defendant.

Which motions the court on the 29th day of August, 1893, overruled; to which ruling and order of the court the defendant then and there duly excepted, and that the above matter and things, rulings and exceptions, may be made a part of the record de-

28 fendant tenders this his bill of exceptions and prays that the same may be signed and sealed as such, which is accordingly done this 6th day of January, 1894.

CYRUS A. ANTHONY,
Judge of the Holt County Circuit Court.

STATE OF MISSOURI, } ss:
County of Holt, }

I, Gouv. Morris, clerk of the circuit court within and for the county of Holt, in the State aforesaid, do hereby certify that the above and foregoing is a complete transcript of the record entries, papers filed, and proceedings had in the cause therein named as the same appear of record and on file in my office.

Given under my hand and seal of said court this 26th day of February, 1894.

[SEAL.] GOUV. MORRIS,
Circuit Clerk.

And afterwards, to wit, on the 30th day of June, 1894, the following proceedings were had in said cause, viz:

Ordered by the court that all criminal cases now on file be set for hearing at the October term, 1894.

And afterwards, to wit, on the 12th day of October, 1894, the further following proceedings were had in said cause, viz:

State of Mo., resp., *v.* J. R. Parsons, app.
State of Mo., resp., *v.* Philip Martin, app.
State of Mo., resp., *v.* Wm. Dettmer, app.
State of Mo., resp., *v.* Arnold Wyatt, app.

29 Come now the said parties, by attorneys, and submit these causes to the court on briefs.

And afterwards, to wit, on the 5th day of November, 1894, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, Respondent, } Appeal from Holt County Circuit Court.
vs.
I. R. PARSONS, Appellant. }

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court, here now, being sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid by the said Holt county circuit court rendered, be in all things affirmed and stand in full force and effect, and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, Division No. 2, October Term, 1894.

STATE OF MISSOURI, Respondent, }
vs.
I. R. PARSONS, Appellant. }

At the August term, 1893, of the circuit court of Holt county, Missouri, the defendant was convicted and fined $50 under an in-

formation filed against him before a justice of the peace of said county, by the prosecuting attorney thereof, charging him
30 with dealing as a peddler without a license. He was convicted before the justice, from whose judgment he appealed to the circuit court.

The offense is charged to have been committed in said county in the month of June, 1893, at which time defendant was a resident of the State of Iowa, and was selling medicine by the bottle as the agent or employee of the F. S. Baker Company, of Keokuk, Iowa, by whom the medicine was manufactured in that place and shipped to defendant in boxes as he might need it for sale. The cause is in this court on defendant's appeal.

At the close of the evidence the court instructed the jury as follows:

"The jury are instructed that if they believe from the evidence that if the defendant did, at the county of Holt and the State of Missouri, on or about the 17th day of June, 1893, deal in the selling of medicine by going from place to place to sell the same, that he did then and there use a two-horse wagon for that purpose, without then and there having a peddler's license permitting him so to do, you will find the defendant guilty as charged in the third count of the information, and assess his penalty at a fine of fifty dollars."

"The defendant is presumed to be innocent of the offense charged, and unless you believe from the evidence, and that beyond a reasonable doubt, that the State has established the guilt of the defendant, as charged, you will acquit him, but a doubt, to authorize an acquittal, should be a substantial doubt of defendant's guilt and not a mere probability of his innocence."

The defendant then interposed the following demurrer to the evidence:

"1st. Because the evidence fails to disclose facts sufficient
31 to convict.

2d. Because the facts disclose that under the interstate-commerce clauses of the Constitution, section 8, article 1, the defendant is not required to have a license, and a Federal question is involved.

3rd. Because the State failed to prove that defendant had no license."

Which the court refused; to which refusal the defendant, by his counsel, duly excepted.

No objection is made in this court to the instructions which were given by the trial court.

The statute under which defendant was convicted is as follows:

"SEC. 7211. Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except books, charts, maps and stationary, by going from place to place to sell the same, is declared to be a peddler."

"SEC. 7212. No person shall deal as a peddler without a license; and no two or more persons shall deal under the same license, either as partners agents or otherwise; and no peddler shall sell wines or spirituous liquors."

"Section 7217 provides that there shall be paid on all peddlers' licenses a State tax of the following rates: If he carry his goods on one or more horses or other beasts of burden, ten dollars for every period of six months, if with a cart or other land carriage, twenty dollars for every period of six months."

"Sec. 7218 provides that every person who shall be found dealing as a peddler contrary to law or the terms of his license shall forfeit, if in a cart or land carriage $50."

That the defendant was a peddler within the meaning of
32 the statute, and as found by the jury, seems clear and beyond controversy. The State *vs.* Smithson, 106 Mo., 149; see also State *vs.* Emert, 103 Mo., 241.

It is insisted by counsel for defendant in their brief and printed argument, first, that the goods sold by defendant were in the original package in which the importer shipped them into this State; second, that the State failed to prove that the defendant did not have a license. All other questions involved in this controversy they concede were passed upon in the Smithson case.

It is urged by counsel for defendant that at the time the medicine was sold by defendant it was in the original package, just as it was shipped to him by his employer, the F. S. Baker Company, of the State of Iowa, by whom it was manufactured at Keokuk, in that State, and that as against that company, they being non-residents of this State, the statute above quoted is in conflict with that clause in sec. 8, article 1, Constitution United States, which provides that Congress shall have power "To regulate commerce with foreign nations and among the several States and with the Indian tribes." The facts in proof do not sustain this contention. The defendant testified that the medicine was shipped to him in boxes; that the bottles were separately wrapped, and that he sold them separately, and that they came to him by freight on the railroad in a box. The evidence of the defendant was all there was with respect of the manner in which the medicine was shipped, which clearly shows that the box and contents constituted the original package, and that when opened and the contents separated that the original pack-
age was broken, and that although composed of a number of
33 bottles separately wrapped, that no one of them became an original package. It is true that, in the absence of any legislation by Congress to the contrary, the importer may determine the form and size of his packages he puts up for export or shipment, but he must ship them as they are put up, and cannot put a dozen or more bottles in the same box, and then claim that each bottle is a separate original package. They do not become a package until made up or prepared for transportation. Commonwealth *v.* Schollenberger, 27 At. Rep., 30. In Keith *v.* Alabama L. R. A., Book 10, p. 431, it is said: "The term 'to pack,' in its ordinary signification, especially when used in reference to carriage, means to place together and prepare for transportation, as to make up a bundle or bale, and package is a bundle or bale made up for transportation. It may consist of a single article, but when separate articles are placed together and prepared for transportation in a bundle, bale, or box or

other receptable, they do not form as many separate and distinct packages as there are articles, though they may be wrapped separately. The case or box or bale in which separate articles are placed together for transportation constitutes the original package in the commercial sense." The separate wrapping of each bottle seems to have been a mere contrivance, so that each bottle might be claimed to be an original package, while the scheme had no tendency whatever to make it such. The court did not, therefore, commit error in failing to instruct upon that theory of the case.

A final contention is that the State failed to prove that the defendant did not have a peddler's license. If the defendant had a license it was a matter which was particularly within his knowledge, and the rule has always been in this State that when
34 such a defense is made it devolves upon the defendant to produce his license. The burden is not upon the State in this respect. State *vs.* Edward, 60 Mo., 490; Schmidt *vs.* State, 14 Mo., 137; Wheat *vs.* State, 6 Mo., 456.

The judgment is affirmed. All of this division concur.

G. D. BURGESS, *J.*

And afterwards, to wit, on the 19th day of February, 1895, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI, Respondent,
vs.
I. R. PARSONS, Appellant.

Now, at this day, there is presented to Honorable James B. Gantt, presiding judge of division No. 2 of the supreme court of the State of Missouri, at chambers, a writ of error to reverse the judgment in the above-entitled cause, a citation directed to said respondent citing and admonishing it to be and appear at a Supreme Court of the United States on the 21st day of March next, and a bond in the sum of five hundred dollars; which said writ of error is allowed, said citation signed, and said bond approved and ordered to be filed and made a part of the record herein.

Which said bond is in words and figures as follows, to wit:

Know all men by these presents that we, I. R. Parsons, principal, and E. S. Baker and C. R. Joy, as sureties, are held and firmly bound unto the State of Missouri in the full and just sum of
35 five hundred ($500) dollars, to be paid to the said State of Missouri; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals this 19th day of February, 1895.

Whereas, at the October term, A. D. 1894, of the supreme court of the State of Missouri, in a suit pending in said court between The State of Missouri, as respondent, and I. R. Parsons, as appellant, judgment and decision was rendered against said I. R. Parsons, and the said I. R. Parsons having obtained a writ of error *into* a Supreme Court of the United States and filed a copy thereof in the

clerk's office of the said court to reverse the judgment and decision in the aforesaid suit, and a citation directed to the said State of Missouri, citing and admonishing it to be and appear, by its attorney general, at the Supreme Court of the United States thirty days from the 19th day of February, 1895:

Now, the condition of the above obligation is such that if the said I. R. Parsons shall prosecute said writ of error to effect and answer all costs if said I. R. Parsons fail to make his plea good, then the above obligation is void; else to remain in full force and effect.

I. R. PARSONS.
E. S. BAKER, *Surety.*
C. R. JOY, *Surety.*

STATE OF IOWA, } *ss:*
Lee County, }

We, E. S. Baker and C. R. Joy, the sureties on the foregoing bond, each of us, upon our separate and several oaths, do say that
36 we are each of us worth, in real property free of incumbrance and subject to execution in the State of Iowa, the sum of one thousand ($1,000), as we verily believe.

E. S. BAKER.
C. R. JOY.

Subscribed and sworn to before me this 19th day of February, A. D. 1895.

[SEAL.] JOHN E. CRAIG,
Notary Public.

STATE OF IOWA, } *ss:*
Lee County, }

I, H. C. Stempel, clerk of the district court of Lee county, Iowa, do hereby certify that E. S. Baker and C. R. Joy, the sureties on above bond, are personally known to me, and if said bond was presented to me for approval I would approve same.

Witness my hand and seal of said court this 19th day
[SEAL.] of February, A. D. 1895.

H. C. STEMPEL, *Clerk,*
By J. B. McNAMARA, *Deputy.*

Approved this 19th day of February, 1895.

JAS. B. GANTT,
Presiding Judge.

STATE OF MISSOURI, *set:*

I, John R. Green, clerk of the supreme court of the State of Missouri, certify that the above and foregoing is a full, true, and
37 complete transcript of the record and proceedings in the case of the State of Missouri, respondent, against I. R. Parsons, appellant, as fully and complete as the same appears of record and on file in my said office.

In witness whereof I have hereunto set my hand as clerk and affixed the seal of said court. Done at office, in Jefferson City, Missouri, this 25 day of February, A. D. 1895.

Seal of the Supreme Court of Missouri.

JNO. R. GREEN, *Clerk.*

38 *Assignment of Errors in the Supreme Court of the United States.*

In the Supreme Court of the United States, —— Term, 1895.

STATE OF MISSOURI, Defendant in Error,
vs.
I. R. PARSONS, Plaintiff in Error.

Assignment of errors.

And afterwards, to wit, on the — day of March, at the — term, A. D. 1895, of the Supreme Court, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes said I. R. Parsons, by John E. Craig, his attorney, and says that in the records and proceedings aforesaid, to which this assignment of error- is attached, there is manifest error in this, to wit:

First. The supreme court of the State of Missouri erred in entering judgment in favor of the constitutionality of sections 7211, 7212, 7217, 7218 of the Revised Statutes of Missouri upon the facts as made by the record of the circuit court of Holt county, Missouri.

2nd. The supreme court of the State of Missouri erred in holding that I. R. Parsons, the plaintiff in error herein, was guilty of violation of section- 7218 and 7211 of the Revised Statutes of Missouri.

3rd. The supreme court of the State of Missouri erred in not finding, upon the facts as disclosed by the record of the circuit court of Holt county, Missouri, that the statutes of the State of Missouri, namely, 7218, 7211, 7212, and 7217, where in contravention
39 of the Constitution of the United States as applied to this plaintiff in error.

4th. The supreme court of the State of Missouri erred in not finding upon the facts disclosed by the record that the statutes referred to were in contravention of section 8, article 1, of the Federal Constitution.

5th. The supreme court of Missouri erred in not reversing the judgment of the circuit court of Holt county, Missouri, & in finding or holding that the bottles described in the record were not original packages.

6th. The supreme court of Missouri erred in holding that plaintiff in error, I. R. Parsons, was required to pay a license for selling proprietory medicines manufactured in the State of Iowa and sold in the original packages in the State of Missouri when shipped into the State of Missouri, and they erred because such requirement would be an attempt to regulate commerce between different States and would be in contravention of the Federal Constitution.

7th. The supreme court of the State of Missouri erred in affirming the judgment of the circuit court of Holt county, Missouri.

8th. The supreme court of the State of Missouri erred in holding that under section- 7211, 7212, 7217, and 7218 that the plaintiff in error should be required to pay a license for selling of proprietory medicines manufactured in the State of Iowa by an agent of a manufacturing house in Iowa who was selling the goods, which had been shipped into Missouri from Iowa in the original package in which they were originally put up, and shipped to the plaintiff in error, and that such holding by the supreme court of the State of Missouri was an interference with interstate commerce and in violation of section 8, article one, of the Constitution of the United States.

And the said I. R. Parsons prays that the judgment and the decision of the supreme court of the State of Missouri may be reversed, annulled, and altogether held for naught, and that he may be restored to all that he may have lost by occasion of said judgment in error.

JOHN E. CRAIG,
Att'y for Plaintiff in Error.

Endorsed on cover: Case No. 15,836. Missouri supreme court. Term No., 563. I. R. Parsons, plaintiff in error, *vs.* The State of Missouri. Filed March 20th, 1895.

166-718

Office Supreme Court U. S.
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OCT 4 1895
JAMES H. McKENNEY,
CLERK.

166-718

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

No. 563.

I. R. PARSONS, *Plaintiff in Error*,

vs.

THE STATE OF MISSOURI.

Writ of Error to Supreme Court of Missouri.

JOHN E. CRAIG, *for Plaintiff in Error*,
R. F. WALKER, *for Defendant in Error*.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

No. 563.

I. R. PARSONS, *Plaintiff in Error*,

vs.

THE STATE OF MISSOURI.

Writ of Error to Supreme Court of Missouri.

JOHN E. CRAIG, *for Plaintiff in Error*,
R. F. WALKER, *for Defendant in Error*.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This case is a proceeding under the penal statutes of Missouri to punish the plaintiff in error for selling proprietary medicines without paying a license. The facts are almost if not entirely undisputed. I. R. Parsons was a resident of Mt. Ayr, Iowa, and was employed by S. F. Baker & Co., of Keokuk, Iowa, manufacturers of proprietary medicines at a salary of $420 per

year and expenses. Said Parsons travelled in a two horse conveyance and sold the medicines in the original packages in which they were put up and they were sold for cash by the bottle. (See transcript 12, 13, 14). Said S. F. Baker & Co., did business in no other place except in Keokuk Iowa, and there did their business by manufacturing their goods at Keokuk, Iowa, for the supplying of their trade which extended into the states of Missouri and Illinois, and they put up their goods in boxes and bottles, each bottle being sealed up and wrapped in a separate wrapper. These goods were sent to their agents either at their homes or where they were in these same packages, and were sold by them to the trade as they were originally put up. They were sent by means of railways to the agents in Missouri or were hauled by wagons and sold from the wagons in the original packages in which they were put up to whoever would buy. I. R. Parson being one of their traveling salesmen and traveled from Mt. Ayr, Iowa, into Holt county, Missouri. Said Parsons was arrested on June 27, 1893, in Holt county, Mo., and charged before a justice of the peace with peddling without a license as set out in the information (see record pages 3, 4 and 5). Trial was had before the justice and defendant found guilty under section 7218, of revised statutes of Mo. From the decision so rendered, defendant appealed to the Circuit Court of Holt county and on August 28, 1893, trial was had before Judge Anthony and a jury, and when the evidence for the state had closed, defendant by his counsel moved for a verdict for defendant because the evidence failed to disclose facts sufficient to convict. Because the facts disclosed that under the inter-state commerce clause of the constitution; section 8, article 1, the defendant or plaintiff in error is not required to have a license and a federal question is involved; and the court overruled said motion to instruct the jury to find for defendant, and defendant excepted. The defendant then offered their evidence as set out in the record pages 12, 13, 14 and 15.

The defendant or plaintiff in error asked an instruction in the nature of a demurrer to the evidence, and the court gave the instruction set out in the record page 16 asked by the state and defendant or plaintiff in error excepted.

The defendant asked the court to instruct the jury to find the defendant not guilty, for the reasons set out in the demurrer to its evidence and information, which the court refused and defendant excepted. The jury found defendant guilty and assessed his fine at $50, and in due time defendant filed motions for a new trial and in arrest, which being overruled defendant appealed to the Supreme Court of Mo., and the case having been there heard and decided adversely to defendant; he appeals to the Supreme Court of the United States and appears in this cause as the plaintiff in error.

The statutes of Missouri under which it was sought to hold and punish the plaintiff in error are as follows:

Sec. 7211. "Whoever shall deal in the selling of patents; patent rights, patent or other medicines, lightning rods, goods, wares, or merchandise, except books, charts, maps and stationery, by going from place to place to sell the same, is declared to be a peddler."

Sec. 7212. "No person shall deal as a peddler without a license; and no two or more persons shall deal under the same license, either as partners, agents or otherwise; and no peddler shall sell wines or spirituous liquors."

Sec. 7217. "There shall be levied and paid on all peddlers licenses a state tax of the following rates: First, if the peddler travel and carry his goods on foot, three dollars for every period of six months; second, if one or more horses or other beasts of burden, ten dollars for every period of six months; third, if a cart or other land carriage, twenty dollars for every period of six months; fourth, if in a boat or other river vessel, at the rate of one dollar per day for any period of not less than five days; and such license may be renewed at the expiration of the first

license, for any period not greater than six months, on payment of fifty cents a day, the number of days to be specified in such license. Any county court may, by an order of record require all peddlers doing business in their county to pay a license tax not greater than that levied for state purposes."

Sec. 7218. "Every person who shall be found dealing as a peddler, contrary to law or the terms of his license, shall forfeit, if a foot peddler, the sum of ten dollars; on one or more beasts of burden, twenty-five dollars; in a cart or other land carriage, fifty dollars; in a boat or other vessel, one hundred dollars."

And there are several other sections of this law but it is not necessary to print them as they have no application to the question involved in this suit.

ASSIGNMENT OF ERRORS.

In the rendition of the opinion and the sustaining of the judgment of the Circuit Court by the Supreme Court of the State of Missouri, error intervened to the prejudice of I. R. Parsons, plaintiff in error, as will appear from the record and among the said errors so intervening are the following, to-wit:

First. The Supreme Court of Missouri erred in affirming the judgment of the circuit court because said S. F. Baker & Co., being residents and citizens of the State of Iowa and engaged in the business of manufacturing proprietary medicines in the City of Keokuk, State of Iowa, said medicines being put up in Keokuk Iowa, by the said S. F. Baker & Co., and sold in bottles and whereby said S. F. Baker & Co., by means of the railroad and wagons, engaged in inter-state commerce and said S. F. Baker & Co., imported from the State of Iowa as citizens thereof, their goods and sold and offered for sale through their agent, I. R. Parsons, in the State of Missouri, in the original form and in unbroken packages as manufactured and put up by said S. F. Baker & Co., in Keokuk, Iowa.

And the Supreme Court erred in holding that such sales and

offers to sell without having paid a license therefor was in violation of sections 7212, 7217 and 7218 of the revised statutes of Missouri and that I. R. Parsons was subject to punishment under section 7218.

Second. Said S. F. Baker & Co., being residents and citizens of the City of Keokuk, State of Iowa, engaged in the business at Keokuk of manufacturing proprietary medicines and same being put up in Keokuk in sealed bottles, was by said S. F. Baker & Co., imported into the State of Missouri in such sealed bottles, and by said S. F. Baker & Co., through their agent, I. R. Parsons, being citizens of the State of Iowa, was sold and offered for sale in the State of Missouri in the original and unbroken bottles and packages as manufactured and put up by them in Keokuk, Iowa, and imported into the State of Missouri, and the Supreme Court of the State of Missouri held that such sales and offers to sell were in violation of the sections of the revised statutes of Missouri as set out in transcript of record, pages 19 and 20, and the Supreme Court of the State of Missouri erred in not holding that said sections were in controvention of section 8, article 1, of the Constitution of the United States.

Third. Said Supreme Court of Missouri erred in holding that upon the facts as set out on pages 12, 13, 14 and 15 of the transcript of record, that said sections of the revised statutes heretofore referred to were valid and not in controvention of section 8, article 1, of the Constitution of the United States.

Fourth. The Supreme Court of the State of Missouri erred in holding in their opinion that the box and the contents as a whole constituted the original package and that when opened and the contents separated then the original package was broken.

Fifth. The Supreme Court of Missouri erred in holding that no one of the bottles in which the medicines were originally put up constituted an original package.

Sixth. The Supreme Court erred in finding and adjudging plaintiff in error should be fined the sum of $50.00 for peddling without a license and in affirming the judgment of the Circuit Court.

Seventh. The Supreme Court of Missouri erred in sustaining the instruction to the jury as set out in record, page 16.

Eighth. The Supreme Court of Missouri erred in sustaining the Circuit Court in refusing to instruct the jury as asked by the plaintiff in error on page 16 of record.

Thus the questions raised by the record and the above assignment are:

First. Did the evidence of the state disclose sufficient facts to convict and did the court err in overruling plaintiff in error's demurrer to the evidence of the state?

Second. Does the facts disclose that the plaintiff in error under the inter-state commerce clause of the Federal Constitution, Section 8, Article 1, was exempt from the payment of a license under section 7212 and 7217 of the Revised Statutes of Missouri, and he should have been punished under section 7218.

Third. Did the court err in refusing to give the instruction asked in nature of the demurrer to the evidence and dismissing the case because under the Inter-state Commerce Clause of the Constitution Section 8, Article 1, plaintiff in error could not be punished for selling the goods he had in his wagon in the original package in which they were put up, he and his principles both being residents of a foreign state.

BRIEF.

The questions involved in this case are not new ones and have all been determined in cases that have been heretofore decided with the exception of possibly one question which is were the goods offered for sale in the case at bar, in the original packages as the importer shipped them to Missouri and so sold?

This seems to be the question upon which this case hinges as is indicated in the opinion of the Supreme Court of Missouri which is found on pages 19, 20 and 21 of the record.

I don't care to take up the time of the court in discussing the propositions that might rise in this case when the general question of the right of the state to tax property that was imported into the state, as those questions were ably discussed in the case of Emmert against the State of Missouri, referred to by the court and found in 156 U. S., at page 296, but the question above set out and upon which the court in its opinion is so elaborate, is the question whether or not the packages imported were the original packages.

It will be conceded no doubt that if the packages were unbroken when the sale was made and were in the shape in which they had been shipped into the state, then the decision in the case of Leisy vs. Hardin, 135th U. S., page 100, would apply, and the only condition that would entitle the state to impose a license tax would be a finding that property had become incorporated and mixed up with the mass of the property in the country, or when it was so acted upon by the importer that it becomes a part of the common property of the state and no longer retains its character as an original package.

The facts in this case seem to be clear upon the point that the property sold was in the original package as it had been wrapped and shipped, and the distinction which the Supreme Court of Missouri in its opinion undertakes to make is that the medicines shipped in a box, in bottles, that the contents of the box constituted the original package and that when the box was opened and the contents separated that the original package was broken and that the different bottles when seperated, although wrapped separately, were not an original package.

The court concedes that the importer may determine the form and size of the package that he puts up for import or

shipment, but insists that he must ship them in a single bottle and must not put them into a box and then claim that each bottle is an original package.

It does seem to me that the authorities cited do not sustain the position of the learned judge cited in his opinion. The case of Commonwealth vs. Schoelenberger, 27th, At. Rep., page 30, and Keith vs. Alabama L. R. A., Book 10, page 431. The court in that case states that where the bottles are wrapped in separate papers and in that condition delivered to the carrier, who, for the purpose of facilitating transportation, placed the bottles in boxes, a bottle will constitute an original package.

I fail to see any reason why, if the importer has the right to sell, that the state have any right in any manner to interfere with the manner of sale, nor can I see any reason why if the person is permitted to place a dozen original packages in a basket and carry them on his arm across the state line into Missouri from Iowa; why he should be permitted to dispose of those original packages without paying a license, while he would be required to pay a license if he hauled them across in a wagon or took them by railroad train.

As Chief Justice Marshall stated in Brown vs. Maryland, 12th Wheaton, 417, "there is no difference in effect between the power to prohibit the sale of an article and the power to prohibit its introduction into a country and one, would be the necessary consequence of the other. No goods would be imported if none could be sold. It is inconceivable that the power to authorize this traffic when give in the most comprehensive terms with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value."

It seems to me that the courts have decided what constitutes the mingling of property with the common mass of property within the state, is the selling of it in the state, that is, when it is sold and paid for in the hands of the purchaser, it

becomes a part of the common mass of the property in the state, and not before. Bowman vs. Chicago R'y Co., 125th U. S., 444.

We submit that the judge of the lower court, in submitting the matter to the jury, should have instructed the jury that under the testimony, the state had no case and he should have submitted the question to them as to whether or not the package testified to were original packages, after defining to the jury what constituted an original package; this he failed to do.

We do not regard it as necessary to go into a review of the cases upon what constitutes articles of commerce and the effect of non-action of congress upon the rights of states to regulate commerce, and the extent and the limit of the police powers of the states. As these questions have been before this court in so many different forms, and the court has passed upon them in the repeated decisions of this court which are used in the discussion of every case that has come before this court under the Kansas and Iowa prohibitory laws, that it would be unneccessarily taking up the time of the court to again discuss them or present them in the argument of this case upon the general principle that to impose a license upon a manufacturer of a foreign state, as the sections above referred to as a regulation of inter-state commerce that is inhibited by the Constitution, Section 8, Article 1.

The Supreme Court of Missouri in the case of State vs. Smithson 106, Mo. 149, indicated in their opinion that they would have followed the opinion of the Supreme Court in the case of Leisy vs. Hardin, 135 U. S., 100, had it been disclosed that the goods sold by Smithson were in the original packages when sold and were manufactured beyond the limits of the State of Missouri. The learned judge writing the opinion says: "We do not think that defendant has raised a constitutional question on the admitted facts. It does not appear that the medicines he was selling were manufactured beyond the limits of this stste. It does not appear if they were so manufactur-

ed or compounded, when or in what shape, or in what sized packages they were transported into this state, nor are we informed in what sized packages he was selling these, "whether in the original packages or otherwise, indeed only inferentially can we surmise that they were the products of S. F. Baker & Co.'s own compounding, that firm might have bought a drug store in this state. They manufactured medicines in Iowa, but were these medicines that were sold by defendant in Sullivan county some of their manufacture? If so when sold were they in original packagss in which they were brought into this state. The answer to these questions might bring up a federal question," and then the court proceeds to avoid the determination of the questions which the defendant insisted upon in that case. In this case these questions must be met, and the facts necessary to bring them up have been proved, and the court if it follows the decision of the Supreme Court of the United States as the Supreme Court of Kansas, although not agreeing with the United States Supreme Court; in the case of Cochran vs. Winters, 10 L. A. R., 616, they should decide that plaintiff in error should have been acquitted and the court below should have so instructed the jury.

The facts on these points suggested by the court in the Smithson case as disclosed by the testimony, are that the medicines offered for sale were manufactured beyond the limits of the state of Missouri, that they were transported into the state in the packages they were originally put up in, and were offered for sale in such original packages as put up by Dr. S. F. Baker & Co., in Keokuk, Iowa, and that the packages were unbroken; that they were the products of S. F. Baker & Co.'s own compounding, manufactured in Keokuk, Iowa, and then shipped in the original packages to the plaintiff in error to be sold in such packages, as their agent and employer.

These facts being as above, the conclusion is inevitable that the plaintiff in error was entitled to sell the goods without being

required to pay the license provided in sec. 7217, R. S., Mo. It is no doubt true that state courts look for ways to avoid the operation of the constitutional provision and try to sustain statutes that attempt to regulate commerce, and especially is this so as to intoxicating liquors on account of their deleterious character; but the strict construction that may be placed upon statutes because it is intoxicating liquors that is being dealt with should cause no harsher rule to be applied to other commodities that do not partake of the objectionable features attributable to intoxicants. In the Kansas case the court says: "It has seldom if ever been considered in any civilized country that the same freedom with respect to the traffic in and the use of intoxicating liquors should be allowed as is freely permitted with respect to nearly all the other kinds of products subject to traffic or use." Intoxicating liquors are never considered as coming within the category of the necessities of life, nor even as good or wholesome food or drink or proper articles for general consumption. They are never considered like wheat or corn, or boots or shoes, or any of the harmless articles of traffic or use which need no regulation or restriction. They are considered almost as outlaws. In their unrestricted sale and use they are pernicious, deleterious, baneful. They operate as tempters and seducers, alluring people into vice and crime and constitute a perpetual menace and threat against the peace and quiet and good order and welfare of society. Their proper classification would rather be with such dangerous articles as dynamite, nitro-glycerine, venomous reptiles, dangerous animals, poisons, articles containing the germs of infectious diseases and "infernal machines" than with any of the harmless or inocuous articles of commerce. Hence, in all civilized countries they are considered as the proper subjects of regulation, restriction and to some extent prohibition; and all this has generally been considered as coming within the proper scope of the police power of the several states or governments. In this state the sale and use of in-

toxicating liquors are regulated, restricted, and to some extent prohibited by law; and the Supreme Court of the United States has held such law to be valid.

Foster vs. Kansas, 112 U. S., 201, 28 L. ed., 696.

Mugler vs. Kansas, 123 U. S., 623, 31 L. ed., 205.

But in a subsequent case from Iowa that court decided that the liquor laws of the several states will not apply to sales made by the importer or his agent of intoxicating liquors imported from other states or countries, so long as such liquors remain in the unbroken packages in which they existed during their transportation.

Leisy vs. Hardin, 135 U. S., 100, 34 L. ed. 128.

This decision was made upon supposed authority of that provision of the federal constitution which gives to congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes."

United States constitution, Art. 1, Sec. 8.

This court does not agree with that court upon this question.

State vs. Fulker, 43 Kan., 237.

But it is our duty to follow that court and we shall do so."

This discloses what the Supreme Court of Kansas think of the matter as to intoxicants as compared with other articles of commerce and how they view the case of Leisy vs. Hardin. Had there been any way which they could have found otherwise they would have so done on account of the nature of the article sold. Had the size or kind of package had anything to do with the decision in the Leisy case they would have made it the basis of a different decision in the Winters case. The packages in that case were bottles of beer, single pint, half-pint and quart bottles of whisky simply wrapped in paper. The size of the package, etc., would not have entered into any decision of any case had it not sprung from the conviction that liquor in

form or in any sized package is not a legitimate subject of commerce.

See Re Beine, 42 Fed. Rep. 545.

The strong language of the Leisy case on this subject settles this question beyond controversy or cavil, and when that language applies to intoxicants, which are looked upon at best as articles little better than contraband, how much more should it look with leniency to articles that are not subject to the suspicion that they will bring crime and woe upon the community when sold. The object of the constitutional provision, section 8, article 1, is to not allow one state by legislation to interfere with the free intercourse of commerce between states under any guise whatsoever by pretended police regulations, prohibitory laws, or peddling or hawking statutes. The opinion of the court in the Leisy case shows that all attempts made by states to interfere with commerce by statutes of this nature will not be permitted because it is an infringement upon the exclusive rights of congress, under section 8, article 1 of the constitution.

A statute compelling an auctioneer to pay a tax on his sales was held in Cook vs. Pennsylvania, 97 U. S., 556, to be an attempt to regulate commerce, and was inhibited by the federal constitution.

A statute levying a tax upon non-residents offering for sale or selling goods manufactured or belonging to citizens of other states was held in Robbins vs. Taxing Dist. 120 U. S., 497, to be an attempted regulation of inter-state commerce and was inhibited; and the Supreme Court says this power being exclusive, the states cannot exercise that power without the assent of congress. There are other cases where this question has been repeatedly decided in cases from almost all the states, and it has been against the states' right to regulate, and the court holds commerce between the citizens of the different states must be unrestricted by these statutory provisions.

The state of Missouri may have the right to tax its own people who sell their goods from place to place, but that does not give them the right to require the citizen of another state who brings his manufactured article into the state and sells or offers to sell it to Missouri people to pay a tax upon it in the shape of a license for peddling. S. F. Baker & Son are manufacturers of proprietary medicines, and they sell them by means of traveling salesmen who use carriages instead of the railroads, and they go from place to place just as any drug house's traveling salesman goes from place to place, and they sell their medicines in the original packages in which they are done up. One bottle or a dozen, as it happens,—if a family buys, they purchase one or two bottles; if a druggist buys, he buys a dozen bottles. If the manufacturer of beer in Missouri can sell his beer in Iowa without a license, surely the manufacturer of medicine in Iowa can sell his medicine in Missouri without a license.

S. F. Baker & Son advertise their medicines by first sending out their advertisements and samples, and then going over the route again and selling the packages of medicine. They certainly, under the decisions of the court, are not liable to be taxed for this.

No one would for a moment deny the right of S. F. Baker & Son to send their goods to Missouri, and they can keep them there, but how useless the right would be to them if they could not sell them there, and the State of Missouri could as well place a prohibition tax upon those goods as any tax.

Their traveling salesmen cannot be legally arrested for not having a license under the peddling statutes of Missouri, section 7218, R. S. Mo.

Chief Justice Marshall, in the case of Gibbons vs. Ogden, 9 Wheaton, 7, 8 and 9, defines commerce and its regulations as follows: "The power of congress does not stop at the jurisdictional lines of the several states. It would be a very useless

power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. * * * If congress has the power to regulate it, that power must be exercised wherever the subject exists. * * * This principle is, if possible, still more clear when applied to commerce among the several states. * * * Commerce among the states must of necessity be commerce within the states. * * * The power of congress then, whatever it may be, is exercised within the territorial jurisdiction of the several states. * * * We have now arrived at the inquiry. What is that power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all other, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation other than are prescribed in the constitution."

In the case of Brown vs. Maryland, 12 Wheaton, 447, Chief Justice Marshall says: "If this power reaches the interior of a state, it must be capable of authorizing the sale of those articles which it imports. Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported. Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell."

By what process of reasoning could the Supreme Court of Missouri come to the conclusion that the "separate wrapping of each bottle seems to have been a mere contrivance so that such bottle might be claimed to be an original package." There is nothing in the evidence to indicate such and it is certainly contrary to the indicated action of S. F. Baker & Co. Their medicines were put up in bottles, as all proprietary medicines are, and if their salesman put 100 of them in a wagon and go to Missouri to sell them, no court would claim that the wagon was the original package. If he took them by rail part of the way and then transferred them to a wagon, would any court say that was a breaking of the original package, or that that was a mingling of the bottles with the mass of property in the country that would take away its original character?

A comprehensive exposition of the whole question involved in this case is set out in the Leisy case from Iowa and the Winters case from Kansas, and the other cases cited are all familiar to the courts. They are clear and decisive that the state cannot regulate or tax inter-state commerce and cannot place taxes or license upon anyone who sells articles imported from another state in the original package and it matters not how large or small that package may be, the plaintiff in error, a resident of Iowa, representing a manufacturer of Iowa, offering to sell goods imported into Missouri in the original package, had a right to offer it for sale or sell it without the imposition of a license, and his arrest was illegal and wrongful and the decision of the Supreme Court of Missouri, in affirming the decision of the lower court ought to be reversed.

Respectfully submitted,

JOHN E. CRAIG,

For Plaintiff in Error.

166-721

763

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

Ex parte

JOHN CLAFLIN, as Executor, etc., ET AL.,

Petitioners.

Copy of Transcript of Record before the United States Circuit Court of Appeals for the Second Circuit in the Suit of Theodore A. Tuttle, Trustee in Insolvency of the Elm City Company, vs. John Claflin, as Executor, etc., et al., and the Opinion of the Court.

EDMUND WETMORE,
CHARLES W. GOULD,
Of Counsel for Petitioners.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

The within is a copy of the whole record up to and including the decision of the Court of Appeals sought to be reviewed by the petition for *certiorari* in this matter.

The proceedings on motion to send the case back to the Master after said decision and other proceedings subsequent to said decision, which are included in the certified copy of the record on file in this Court, are not printed herewith, as they formed no part of the record before the Court of Appeals upon which said decision was rendered.

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TO THE HONORABLE :

The Judges of the Circuit Court of the United States for the Second Circuit and within the Southern District of New York :

SITTING IN EQUITY.

THEODORE A. TUTTLE, Trustee in Insolvency of the Elm City Company, a citizen and resident of the City of New Haven, in the State of Connecticut, brings this his bill of complaint, against Horace B. Claflin, John Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force and Daniel Robinson, defendants.

And thereupon your orator complains and says that before and at the times hereinafter mentioned the defendants were, and they now are copartners doing business at 140 Church street, in the City of New York and within the Southern District of New York, aforesaid, under the firm name and style of H. B. Claflin & Co.

And your orator further shows unto your Honors that heretofore and before the second day of December, A. D. 1862, Chauncey O. Crosby and Henry Kellogg, then being citizens of the United States, were the original and first inventors and discoverers of certain new and useful improvements in machines for producing folded trimmings ; that being such inventors, the said Crosby and Kellogg made application in writing to the Commissioner of Patents of the United States for the granting of letters patent for the said improvements, and duly swore to the specification for that purpose, that the said improvements were not, nor was either of them, in public use or on sale with the consent and allowance of the said Crosby and Kellogg, or either of them as such inventors, contrary to the provisions of the Statutes of the United States in such case made and provided, and the said improvements were not, nor was either of them, known or used by others anterior to the said invention thereof by the said Crosby and Kellogg ; that the said Crosby and Kellogg duly complied in all respects with the necessary conditions and requirements of the Statutes of the United States, in such case made and provided, prior to the granting of the letters patent hereinafter mentioned ; that on the second day of December, A. D. 1862, letters patent of the United States were issued to the said Crosby and Kellogg, bearing date on that day, and according to law, whereby there was secured to them, their heirs, executors and administrators or assigns, for the term of seventeen years from and after the date thereof, the full and exclusive right and liberty of making, constructing and using, and vending to others to be used, the said improvements, a description whereof was given in the words of the said Crosby and Kellogg in the schedule annexed to said letters patent, and making a part of the same ; that the said letters patent were issued in the name of the United States of America, and were sealed with the seal of the Patent Office of the United States of America, and were signed by the Secretary of the Interior, and countersigned by the Commissioner of Patents, and were issued and delivered to the said Crosby and Kellogg. That before the said Crosby and Kellogg obtained the said letters patent, they did, in

accordance with the statute in that behalf, deliver to the Commissioner of Patents of the United States a written description of the said invention, and of the manner and process of making, constructing and using the same, pointed out the parts, improvements and combinations which they claimed as their discovery, and accompanied the said description with drawings and models of the said invention, which said description was signed and sworn to by the said Crosby and Kellogg, and attested by two witnesses, and filed in the Patent Office, to which said letters patent, and to the schedule thereto annexed and ready to be produced, your orator craves leave to refer.

And your orator further shows unto your Honors that heretofore and in the month of December, 1862, the said Crosby and Kellogg, then being the owners of the said letters patent, did by a valid instrument in writing, by them duly executed, upon a sufficient consideration, duly assign and transfer unto the Elm City Company, all their right, title and interest in and to the said letters patent and invention.

And your orator further shows unto your Honors, that thereafter, and on or about the 9th day of March, 1876, the said The Elm City Company, being unable immediately to pay all its debts in full, as the same had matured, or were maturing, in the ordinary course of business, did duly make a voluntary assignment in insolvency to your orator of all the real and personal property that said corporation had in possession, reversion or remainder, and all debts, notes and choses in action, wheresoever said property was situated, or from whomsoever said debts were due, and the said letters patent so granted as aforesaid to the said Crosby and Kellogg, bearing date the second day of December, 1862, were then owned by said The Elm City Company, and by said deed of assignment your orator became and was, and now is, and ever since has been the owner, as such trustee, of all the rights and privileges granted and secured to the said Crosby and Kellogg, in and by said letters patent, or intended so to be, and your orator now is, subject to said trust, the owner of said letters patent, and by virtue of the said several assignments and transfers in writing, your orator is, as such trustee, entitled to the exclusive right to the invention and improvements in the said letters patent described, granted and secured as aforesaid, but subject to said trust.

And your orator craves leave to refer to, and prove each and all of such several assignments and transfers, each and all of which were duly recorded in the Patent Office, as by said assignments, the originals of which are now in your orator's possession, together with the certificate of the recording thereof, ready in Court to be produced, will fully and at large appear.

And your orator further shows unto your Honors, that the Elm City Company hereinbefore mentioned, was and is a corporation and body politic, duly created such, under and by virtue of the laws of the State of Connecticut, with power to sue and be sued in all the Courts of the United States, to hold and own the patent to said Crosby and Kellogg; and to transfer the same to your orator, as hereinbefore set forth.

Your orator further shows unto your Honors, that the said several improvements, so patented as aforesaid by the said Crosby & Kellogg, are, and each of them is, of very great value and importance, and have been extensively introduced into public use, and that the public generally have acquiesced in your orator's exclusive right to the same, and your orator, and the said The Elm City Company would, but for the wrongful acts and doings of the said defendants and others acting in concord with them, have made large gains and profits, and advantages from the manufacture, sale and use of the said improvements so patented and conveyed unto your orator as aforeraid.

And your orator further shows unto your Honors, that in the year 1870 a suit in equity was brought by the said The Elm City Company, in the Circuit Court of the United States for the Southern District of New York, against George H. Wooster, for an infringement of the said letters patent so granted to the said Crosby and Kellogg, and assigned to your orator as aforesaid; that the defendant, in answer, set up various grounds of defense, as by reference to the record of said suit will appear; that said suit was pending for over three years, during which time proofs, covering over twelve hundred pages, were taken therein, and in the month of March, 1873, it was brought to final hearing on the pleadings and proofs before his Honor, LEWIS B. WOODRUFF, Circuit Judge, and argued by counsel for both parties; after said arguments were closed the Court held said suit under advisement until about the 30th day of June, 1873, when a decision was rendered overruling all the defenses set up by said defendant, and deciding that the said Crosby and Kellogg were the original and first inventors of all that they described and claimed in said patent, and that said patent was good and valid, and that it had been infringed by the said defendant.

And your orator further shows unto your Honors, that the said defendants well knowing the premises, but contriving to injure your orator, and in order to deprive him of the right and privileges aforesaid, and of the profits and advantages thereof at the City of New York aforesaid in the said Southern District of New York, without the license or permission of your orator, have ever since about the month of January, 1870, unlawfully and wrongfully made or caused to be made, and used and sold, or caused to be used and sold machines and mechanism containing and embodying the invention and improvements, and each and every of them, as in said letters patent is set forth, described and claimed as the invention of the said Crosby & Kellogg, the exclusive right to which your orator is entitled, as hereinbefore set forth.

And your orator further shows unto your Honors, that such manufacture, use and sale by the defendant, is unlawful, and in violation of the exclusive rights and privileges so as aforesaid vested in your orator, and your orator insists that he is entitled to recover all such damages as have been caused, and all such profits as have been realized by the said defendants by reason of their said unlawful acts, the amount of which damages and profits, your orator is unable to state, and cannot set forth, but will crave leave to prove the same.

Your orator therefore prays that the said defendants may be compelled by a decree of this Honorable Court, to account for and pay over unto your orator, all such gains and profits as have arisen to, or been earned or received by the said defendants or to which they may be entitled, and all damages which your orator has sustained by reason of the aforesaid unlawful acts of the said defendants, and that the said defendants and each of them, their and each of their clerks, servants, agents, attorneys, solicitors and workmen be perpetually enjoined and restrained by the decree of this Honorable Court from directly or indirectly making or causing to be made, or using, or causing to be used, or vending to others to be used, any machines or mechanism containing the improvements or either of the same granted as aforesaid, in or by the said letters patent of the United States, so granted to the said Crosby & Kellogg, and assigned to your orator, and from infringing upon or violating the same by making, using or vending any of the aforesaid improvements, in any way whatsoever, and that the said defendants may be decreed to pay the costs of this suit, and that your orator may have such other and further relief as the equity of the case may require, and as to your Honors may seem meet.

To the end therefore, that the said defendants may if they can show why your orator should not have the relief herein and hereby prayed for, and may full, true, direct and perfect answers make, according to the best of their knowledge, information and belief, to the several matters hereinbefore averred and set forth, as fully and particularly as if the same were here repeated paragraph by paragraph and they thereunto specifically interrogated.

May it please your Honors to grant unto your orator a writ of subpœna *ad respondendum* issuing out of and under the seal of this Honorable Court, directed to the said Horace B. Claflin, John Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force and Daniel Robinson, defendants, directing them to be and appear and make answer unto this bill of complaint, and to perform and abide by such order and decree made herein as to the Court may seem required by the principles of equity and good conscience.

May it also please your Honors to grant unto your orator a provisional, or preliminary injunction, issuing out of and under the seal of this Honorable Court, restraining the said defendants, and each of them, their and each of their attorneys, solicitors, agents, servants, clerks and workmen to the same purport, tenor and effect hereinbefore prayed for, in regard to said perpetual injunction.

And your orator will ever pray, &c.

THEODORE A. TUTTLE,
Trustee Elm City Company.

CHAS. B. STOUGHTON,
Solicitor and of Counsel with Complainant,
52 Wall St.,
N. Y. City.

UNITED STATES OF AMERICA, }
District of Connecticut, } ss.:

On this tenth day of July, A. D. 1878, before me came Theodore A. Tuttle, trustee of the Elm City Company, complainant in the foregoing bill of complaint, who being by me duly sworn, did depose and say, that he is trustee of said company, that he has read the said bill subscribed by him as such trustee and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

[SEAL.] JONATHAN INGERSOLL,
United States Commissioner.

United States Circuit Court, Southern District of New York.
In Equity.

THEODORE A. TUTTLE, Trustee, &c.,
AGAINST
HORACE B. CLAFLIN, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE and DANIEL ROBINSON.

The replication of Theodore A. Tuttle, trustee, &c., complainant, to the answer of Horace B. Claflin, John Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force and Daniel Robinson, defendants.

This repliant saving and reserving unto himself, now and at all times hereafter, all, and all manner of benefit and advantage of exception, which may be had or taken, to the manifold errors, imperfections and insufficiencies of the said answer, for replication thereunto says, that he will aver, maintain and prove the bill of complaint to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by this repliant. Without this, that any other matter, or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant avers and will be ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays, as in and by his said bill he has already praved.

Dated New York, 28th day of October, 1878.

CHAS. B. STOUGHTON,
Solicitor for Complainants,
52 Wall street,
N. Y. City.

At a Stated Term of the Circuit Court of the United States, for the Second Circuit and Southern District of New York, held at the United States Court Rooms, in the City of New York, on the 15th day of November, 1878.

Present—HON. SAMUEL BLATCHFORD, Judge.

THEODORE A. TUTTLE, Trustee in Insolvency of the Elm City Company,
AGAINST
HORACE B. CLAFLIN, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE, and DANIEL ROBINSON.

A motion for a preliminary injunction in the above entitled cause having come on to be heard, now, after reading and filing the notice of motion, the bill of complaint, the affidavit of Samuel E. Barney, copy of the decree in the case of the Elm City Company against George H. Wooster, copy of the decree in the case of the Elm City Company against John M. Griest and another, copy of the agreement between Theodore A. Tuttle and Silberberg Brothers, the affidavit of Edwin J. Toof, Gustavus Sidenberg, Charles B. Stoughton and the agreement thereto annexed, and the affidavit of Rudolph Schroeder, the admission of service of all the above-mentioned papers and the stipulations thereto annexed, and after hearing Edward C. Garrett, Jr., for the complainant, in support of said motion, Messrs. Vanderpoel, Green & Cuming appearing in opposition thereto, it is

Ordered that an injunction issue pursuant to the prayer of the bill of complaint herein, strictly restraining and enjoining said defendants, Horace B. Claflin, John Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force and Daniel Robinson, and each of them, their and each of their clerks, attorneys, servants, employees and workmen, under the pains and penalties which may fall upon them in case of disobedience.

That they and each of them forthwith and until the further order of this Court absolutely desist from making, using or selling any machines or mechanism containing or embodying any or either of the improvements described and claimed in said letters patent granted to Crosby & Kellogg, bearing date the second day of December, 1862, and numbered 37,033.

SAMUEL BLATCHFORD.

U. S. Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, &c.,
AGAINST
HORACE B. CLAFLIN, *et al.* } In Equity.

SIR:—You will please take notice that the complainant in the above cause desires the evidence to be adduced therein

to be taken orally under the 67th Rule in Equity of the Supreme Court, as amended.

Yours, &c.,
CHAS. B. STOUGHTON,
Complt's. Solicitor,
52 Wall Street,
N. Y. C.

To VANDERPOEL, GREEN & CUMMING, Esqs.,
Defendants' Solicitors,
Tribune Building,
N. Y. C.

Complainant's Exhibit "Certificate of Incorporation."—T. G., Exr.

STATE OF CONNECTICUT, }
Office of Secretary of State. }

ELM CITY COMPANY.

To all whom it may concern: This is to certify and make known that the Elm City Company, located in the town of New Haven in the State of Connecticut, is a corporation formed under the statute law of this State, entitled An Act concerning Communities and Corporations, Chapter 14; that the amount of the capital stock of said corporation is twenty-seven thousand five hundred dollars; that twenty-five thousand five hundred dollars is the amount actually paid in thereon; that the purposes for which said corporation is formed are to manufacture, buy, sell and deal in all kinds of trimmings composed of silk, wool, flax or cotton, and in the machinery, tools and implements therefor; and to do and perform all acts necessary or convenient connected with said business or incidental thereto; that the following are the names of the stockholders with the number of shares by each respectively owned, viz.:

C. O. Crosby, four hundred and forty shares.
Winship & Barney, four hundred and forty shares.
Dexter Alden, two hundred and twenty shares.

C. O. CROSBY,
President of the Elm City Company.

C. O. CROSBY,
LEONARD WINSHIP,
DEXTER ALDEN,
SAMUEL E. BARNEY,
Directors of the Elm City Company.

NEW HAVEN, July 11, 1860.

New Haven County, ss.:

Personally appeared the above-named C. O. Crosby, Dexter Alden, Leonard Winship and Samuel E. Barney, and made solemn

oath to the truth of the foregoing certificate by them subscribed, before me.

LUCIUS G. PECK,
Notary Public.

Received 13th July, 1860, and recorded by J. H. Trumbull, Clerk, for John Boyd, Secretary of State.

STATE OF CONNECTICUT, } ss.:
Office of Secretary of State. }

I, HIRAM APPELMAN, Secretary of the said State of Connecticut, and keeper of the seal thereof, and of the original record of the certificate of the organization of the Elm City Company, of which a copy is hereto annexed, do hereby certify that I have compared the annexed copy of the said certificate with the original record thereof, now remaining in this office, and have found the said copy to be a correct transcript thereof, and of the whole of said original. And I further certify that the said original record is a public record of the said State of Connecticut, and does not appertain to a court; that the original certificate was deposited in this office on the 13th day of July, 1860, and recorded in a book kept for that purpose.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of said State at Hartford this 22d day of March, 1872.

HIRAM APPELMAN,
Secretary of State.

STATE OF CONNECTICUT, } ss.:
Office of Secretary of State, }

I, HIRAM APPELMAN, Secretary of the said State of Connecticut and keeper of the seal thereof, do hereby certify that I am the Secretary of State of the said State of Connecticut, duly elected to the said office, and declared to be so elected by the General Assembly of said State at the May session 1871—from the first Wednesday of May, 1871, until the first Wednesday of May, 1872, as fully appears by the records in this office; and that I have taken the requisite oath to enable me to fulfill the duties of said office of Secretary of State.

In testimony whereof I have hereunto set my hand and
[L. S.] affixed the seal of said State at Hartford this 23d day of May, 1872.

HIRAM APPELMAN,
Secretary of State.

Complainant's "Exhibit Assignment." T. G., Examiner.

Whereas, the United States of America did, on the second day of December, A. D. 1882, grant Letters Patent to C. O. Crosby and Henry Kellogg, both of the City and County of New Haven and State of Connecticut, for improvement in machines for frilling and crimping. And, whereas, the "Elm City Company," whereof the said C. O. Crosby is President and Samuel E. Barney is Secretary, and doing business in the said City of New Haven, are desirous of acquiring an interest therein. Now, this indenture witnesseth, that for and in consideration of the sum of five dollars to us in hand paid, the receipt of which is hereby acknowledged, we have assigned, sold, and set over, and do hereby assign, sell and set over unto the said Elm City Company all the right, title and interest which we have in and to the said invention as secured to us by the said letters patent, or as may be secured to us by any reissue of the said letters patent which may be legally obtained for any remainder or residue of the term for which the said letters patent were originally granted; for, to, and in the United States and Territories and in no other place or places; the same to be held and enjoyed by the said Elm City Company and their legal representatives for their own use and behoof to the full end of the said term, as fully and entirely as the same would have been held and enjoyed by us had this assignment and sale not been made.

In testimony whereof we have hereunto set our hands and seals this fourth day of December, in the year of our Lord one thousand eight hundred and sixty-two.

C. O. CROSBY, [SEAL.]
HENRY KELLOGG, [SEAL.]

Witnesses:
CHAS. A. CROSBY,
E. A. CROSBY.

5 Cent Int. Rev. Stamp Cancelled.

U. S. PATENT OFFICE.

Received and recorded May 27th, 1863, in Liber Y 6, page 105 of Transfers of Patents. In testimony whereof I have caused the seal of the Patent Office to be hereunto affixed.

[SEAL.] D. P. H. MOWRY,
Commissioner of Patents.

Complainant's Exhibit "Assignment Tuttle."

Whereas, the Elm City Company, a company incorporated under the laws of the State of Connecticut and located and having its principal place of business in the Town and Probate District of New Haven, in the State of Connecticut, is unable immediately to

pay all its debts in full as the same have matured or are maturing in the ordinary course of business, and whereas, the Board of Directors of said company have voted in consideration of the premises, that said company make a voluntary assignment in insolvency to be proceeded with before the Probate Court for the District of New Haven, in pursuance of which authority this deed is executed.

Now, therefore, know all men by these presents, that the said corporation, the Elm City Company, in consideration of the premises and of one dollar received to its full satisfaction of Theodore A. Tuttle, of the Town and County of New Haven and State of Connecticut, and in pursuance of the provisions of Part I., Chapter 11, Title 18, of the General Statutes of Connecticut, doth hereby give, grant, bargain, sell, transfer and deliver unto the said Theodore A. Tuttle in trust all the real and personal property that said corporation has in possession, reversion or remainder. Also all debts, notes and choses in action, wheresoever said property may be situated or from whomsoever said debts may be due.

To have and to hold said real and personal estate and all and each article of personal property, and each of said several choses in action aforesaid, to him, the said Theodore A. Tuttle, and his heirs, forever, for the use and behoof of all the creditors of the Elm City Company, in proportion to their respective debts, according to the provisions of the statutes aforesaid.

Dated at New Haven this ninth day of March, A. D. 1876, and said corporation having no corporate seal, its name and a common seal have been hereunto affixed by Leonard Winship, its President, and for this purpose its agent also duly authorized by the board of directors.

THE ELM CITY COMPANY. [SEAL.]
By LEONARD WINSHIP,
President and Agent.

Signed and sealed in the presence of
WM. K. TOWNSEND.
SIMEM E. BALDWIN.

STATE OF CONNECTICUT, New Haven County, } ss.:

NEW HAVEN, March 9, 1876.

Personally appeared Leonard Winship, president and agent of the Elm City Company, and acknowledged the within and foregoing instrument to be the free act and deed of the Elm City Company, before me.

SIMEM E. BALDWIN,
Commissioner of the Supreme Court
for New Haven County.

PROBATE COURT, March 9, 1876.

DISTRICT OF NEW HAVEN, ss.:

The foregoing voluntary assignment of the "Elm City Company" was received for record at 12 o'clock and twenty minutes, in

the afternoon, and Theodore A. Tuttle, of New Haven, in said District, being in said assignment proposed as trustee for the estate of the said Elm City Company, therefore

Ordered, that the 15th day of March, A. D. 1876, at 9 o'clock in the forenoon, be and the same is hereby assigned for a hearing on the approval of said proposed trustee, and that all persons interested therein may have notice to appear if they see cause and be heard therein; this Court directs that this order be published in some daily newspaper printed in said New Haven Probate District, and that a copy of said order be posted on the public sign post in New Haven, in said district, at least five days before said time assigned.

LEVI B. BRADLEY,
Judge.

PROBATE COURT, March 15, 1876.

DISTRICT OF NEW HAVEN, ss.:

Ordered, that the hearing on the approval of the trustee proposed and named in the foregoing assignment be, and the same is hereby, continued to the 17th day of March, A. D. 1876, at 9 o'clock A. M.

LEVI B. BRADLEY,
Judge.

PROBATE COURT, March 17, 1876.

DISTRICT OF NEW HAVEN, ss.:

Ordered, that the hearing on the approval of the trustee proposed and named in the foregoing assignment be, and the same is hereby, continued to the 23d day of March, 1876, at 9 o'clock A. M.

LEVI B. BRADLEY,
Judge.

PROBATE COURT, March 23, 1876.

DISTRICT OF NEW HAVEN, ss.:

Ordered, that the hearing on the approval of the trustee proposed and named in the foregoing assignment be, and the same is hereby, continued to the 24th day of March, A. D. 1876, at 4 o'clock P. M.

LEVI B. BRADLEY,
Judge.

TO THE PROBATE COURT FOR THE DISTRICT OF NEW HAVEN:

Estate of the Elm City Company, assigning debtor. The undersigned hereby makes return that on the 9th day of March, A. D., 1876, he posted on the public signpost on the corner of the Green, in the Town of New Haven, and also deposited with the proprietors of the

"Morning Journal and Courier," a daily newspaper published in the said town, for publication, a notice of the hearing on the approval of the trustee named in the assignment of said company, etc., of which the following is a copy, to wit :

DISTRICT OF NEW HAVEN, } ss. :
Probate Court, March 9, 1876, }

Estate of the "Elm City Company" of New Haven in said district assigning debtor.

The voluntary assignment of the said Elm City Company having been lodged in this office for record and the probate thereof, and Theodore A. Tuttle, of said New Haven, being in said assignment nominated as trustee for the said estate ; therefore

Ordered, that the 15th day of March, 1876, at 9 o'clock forenoon, be, and the same is hereby, assigned for a hearing on the approval of said proposed trustee, and that all persons interested therein may have notice to appear if they see cause, and be heard thereon, this Court directs that this order be published in some daily newspaper printed in said New Haven Probate District, and that a copy of said order be posted on the public sign post in New Haven, in said district, at least five days before said time assigned.

LEVI P. BRADLEY,
Judge.

And that said notice was duly published in the next issue of said newspaper, on March 10th and 11th, 1876, all of which was done pursuant to the order of this Court.

LEONARD WINSHIP,
President of the Elm City Company.

Received and sworn to this 24th day of March, 1876. }

LEVI B. BRADLEY,
Judge.

DISTRICT OF NEW HAVEN, } ss. :
Probate Court, March 24, 1876. }

Return was made that notice had been given of the time and place assigned for a hearing on the appeal of the trustee proposed and named in the foregoing assignment as directed by this Court on the 9th day of March, A. D. 1876, which return this Court finds true, and after a full hearing of all creditors present Theodore A. Tuttle, of said New Haven, was approved as trustee for the estate of said Elm City Company, and he appeared in Court, accepted said trust and gave bond with sufficient securities in the sum of one hundred and twenty-five thousand dollars for the faithful discharge of the duties of his said appointment as such trustee according to law, which bond is accepted and approved by this Court.

LEVI B. BRADLEY,
Judge.

STATE OF CONNECTICUT, }
County of New Haven, } ss. :

I, MAURICE F. BRENNAN, Clerk of the Board of Probate, within and for the District of New Haven, in said County of New Haven, and keeper of the records and seals thereof, hereby certify that I have compared the within and foregoing copy of the voluntary assignment of the Elm City Company of New Haven and the returns and orders therein, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court on this thirteenth day of January, A. D., 1877.

MAURICE F. BRENNAN,
Clerk.

STATE OF CONNECTICUT, }
County of New Haven, } ss. :

I, SAMUEL A. YORK, sole and presiding Judge of the Court of Probate, within and for the District of New Haven, in said County of New Haven, hereby certify that Maurice F. Brennan, whose name is above written and subscribed is and was at the date thereof Clerk of the Court of Probate, within and for the District of New Haven in said New Haven County, and keeper of the records and seal thereof, duly commissioned and sworn; that I am well acquainted with his signature, and know the above to be his, and that the above certificate by him made is in due form to authenticate the records, files and proceedings of said Court.

In testimony whereof I have hereunto set my hand this thirteenth day of January, A. D. 1877.

SAMUEL A. YORK,
Judge.

U. S. Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, &c., }
AGAINST
HORACE B. CLAFLIN ET AL. }

It is hereby stipulated by the defendants that they used, prior to the commencement of this suit, and subsequent to the date of the Crosby & Kellogg patent in suit, two plaiting machines, one like "Exhibit Griffith Machine," herein, and the other like "Exhibit Fanning Machine," herein.

Dated Sept. 26, 1883.

EDMUND WETMORE,
Defts.' Counsel.

United States Circuit Court, Southern District of New York.
[In Equity.]

THEODORE A. TUTTLE, Trustee in Insolvency of the Elm City Company
AGAINST
HORACE B. CLAFLIN and others.

Proofs for final hearing on the part of the complainant taken before Timothy Griffith, as Standing Examiner, under and pursuant to the 67th Rule in Equity, as amended.

NEW YORK, September 26th, 1883,
11 A. M.

Met pursuant to consent.

Present—C. B. STOUGHTON, ESQ., of Counsel with complainant. And EDMUND WETMORE, ESQ., of Counsel with defendants.

Counsel for complainant offers in evidence :

Exemplified copy of Certificate of Incorporation of the Elm City Company, which is marked Complainant's Exhibit " Certificate of Incorporation." T. G., Exr.

Letters Patent of the United States granted to C. O. Crosby and Henry Kellogg, dated December 2d, 1862, number 37,033 for Improvement in filling and crimping, marked " Exhibit No. 37,033." T. G., Exr.

Assignment of patent to the "Elm City Company "—marked " Exhibit Assignment." T. G., Exr.

Assignment of the Elm City Company to Theodore A. Tuttle, marked " Exhibit Assigument Tuttle." T. G., Exr.

Two machines admitted to have been in use by defendants prior to the commencement of this suit and subsequent to December 2d, 1862, marked respectively " Exhibit Griffith Machine," and " Exhibit Fanning Machine." T. G., Exr.

HENRY L. BREVOORT, a witness produced on the part of the complainant, having been first duly sworn, in answer to interrogatories propounded by C. B. STOUGHTON, ESQ., of counsel with the complainant, says :

1 Q. What is your name, age, residence and profession ?

A. Henry L. Brevoort. I am 34 years of age. I reside in the City of Brooklyn, State of New York, and I am by profession a mechanical engineer.

2 Q. What experience have you had in the examination of letters patent and mechanical inventions, and particularly state your experience and knowledge in reference to sewing machines and mechanisms connected therewith, for the purpose of making ruffles or gathers ?

A. For the last ten years I have been almost entirely occupied in examining patents and patented inventions and in comparing machines with patents for the purpose of giving testimony in the Cir-

cuit Courts of the United States both in this and other circuits. I have examined a great number of sewing machines and sewing-machine patents and sewing-machine attachments, and I have been very frequently called upon to testify in suits where this class of machines was involved, and I am now engaged in some eight or ten litigations connected with sewing machines.

3 Q. Have you examined and do you understand the United States Letters Patent granted to Crosby & Kellogg, No. 37,033, dated December 2d, 1862, for a machine for frilling and crimping?

A. I have read a great many times the patent inquired about in the question, and I understand what is therein shown, described and claimed. I have also operated a machine substantially like that described in the said patent, and I have made therewith many yards of frilled goods, adjusting and operating the machine myself.

4 Q. Have you examined and are you acquainted with the structure and operation of the "Roller-Side Plaiting Machine," marked Complainant's Exhibit Griffith machine, T. G., Ex., and with the structure and operation of complainant's exhibit marked Exhibit Fanning Machine, T. G. Exr., being the roller-side plaiting machines, one of which is made by and known as the "Fanning" machine, and the other made by and known as the "Griffith" machine?

A. I have examined both of the machines referred to in the question a great many times, and I have operated and made ruffling with the said machines and consequently understand their structure and mode of operation.

5 Q. Will you please examine the said Crosby & Kellogg patent before referred to and numbered 37,033, being complainant's "Exhibit No. 37,033," T. G., Exr., and state whether or not you find any of the inventions claimed in the said Crosby & Kellogg patent in the said Griffith and Fanning machines, and, if so, which inventions are claimed in the said patent, and give your reasons for any opinion which you may express?

A. I think that after making a careful comparison that the invention claimed in the *first*, *second*, *fourth* and *fifth* claims of the said Crosby & Kellogg patent are found both in the Fanning and in the Griffith machines. I will give you my reasons for this opinion, and I will first state what I understand to be the invention of Crosby & Kellogg as referred to in the claims of their patent above mentioned. The Crosby & Kellogg patent describes a machine for making frills or crimps, or rather, as they are more commonly termed plaits, in a strip of goods fed through the machine. The plaits are made by a reciprocating knife, which moves back and forth over the cloth plate of the machine, and which knife as it moves forward, gathers up the material into a plait, the goods in front of the knife being held by the presser-foot, and the knife completes the formation of the plait when it reaches the adjacent edge of the presser-foot, which in connection with the cloth-plate acts during the forward motion of the knife as a holder, to hold the goods in front of the knife and enable the plait to be formed. After the plait is thus formed it is passed under the presser-foot, and between it and the cloth-plait, the presser-foot and cloth-plait serving to smooth and flatten the plait, while on each side of the presser-feet flexible wings are two supple-

mental smoothers, in case the plait should be wider than the presser-foot, and should have hems on the edges. As the blade is advanced to form the plate, it is pressed upon by a spring, and while it is retracting the spring pressure is relaxed, so that it may pass readily over the goods.

Throughout the specification, that which I have called the blade is called a "crimper," but I have used the former expression as being more fully descriptive of the device.

I am well aware that Crosby and Kellog were not the first people to gather up a strip of goods into folds. Singer had done, or had attempted to do it by two wheel feeds, but the result was very uncertain. Arnold had done it with two four-motion feeds, one of which moved through a greater distance than the other. But in neither of these cases was there a crimper, blade or knife used which had the capacity of taking up on the plait all the material lying between the edges of the presser-foot or the front of the knife, when the latter was in its rear-most position, also neither of the two old machines used an instrumentality which, in forming the plait, could be inserted within the folds thereof. In fact, so far as I know, Crosby & Kellogg were the first to use a "crimper," in the shape of a thin blade which reciprocated to and from the edge of the presser-foot adjacent to the blade.

The *first* claim is for a combination which consists of a crimper or blade, a table or platform, and a holding mechanism or holder which holds the goods against the action of the crimper or blade while forming the crimp.

The *second* claim of the Crosby & Kellogg patent is for a combination consisting of a crimper, or as I have called it, a blade, and a smoother, to-wit, a yielding pressure-foot which, in connection with the cloth-blade, acts to fold the crimp to an edge.

The *fourth* claim is for the combination of the crimper or blade with a spring, which acts to force the crimper upon the goods while forming the crimp or plait, and which relaxes its pressure while the crimper or blade is retreating.

The *fifth* claim is for the crimper or blade and the presser-foot and cloth-plate, which two latter form a holder or holding mechanism in combination with an auxiliary smoother, which consists of springy wings on each side of the presser-foot, which may yield independently of the presser-foot itself.

The Griffith and Fanning machines are both what are known as Roller Plaiting Machines; that is to say, in both there is a rubber yielding upper roll and a metallic lower roll, which are revolved intermittently and which serve when they revolve to feed the plaited or crimped goods, the upper roll serving the function of the presser foot, and the lower roll serving the function of the cloth-plate. In both machines there is a reciprocating blade or crimper, which is caused to advance to and from the bite of the rolls, and which blade as it advances over the surface of the lower roll forms a plait of the material lying between it and the surface of the said roll, the plait being formed when the knife delivers it to the bite of the rolls, which act as a smoother and as a holding mechanism.

In both devices the blade is caused to press upon the goods while

advancing, and its pressure is relieved or released while the blade is retreating, this result being achieved in the case of the Fanning machine identically with the same devices as are used in the Crosby and Kellogg machine, to wit, a spring and cam ; while in the Griffith machine, the function and arrangements of the parts moving forward insures a downward pressure upon the goods, the blade being rocked by the moving mechanism downward on the surface of the goods, while as it retracts, it is rocked upwards and away from the goods, thus releasing its pressure. Undoubtedly the method adopted on the Griffith machine is an equivalent of spring pressure referred to in the *fourth* claim of the Crosby and Kellogg patent.

Referring to the *first* claim of the Crosby and Kellogg patent, I find there specified in combination the knife or crimper, which is to crimp the goods and space the crimps, in combination with a table or platform, and a holding mechanism or clamping mechanism which holds the goods against the action of the crimper or blade. Turning now to the two machines of the defendants, exhibits Griffith and Fanning machines, I find that they both have a crimper or blade for making crimps. I find that they each have the equivalent of the table or platform which is the surface of the lower-roll, and they both have a holding mechanism or holder, which consists of the two rolls at their meeting point. It is evident, therefore, that the defendants' two machines, exhibits Griffith and Fanning machines, contain the invention of the *first* claim of Crosby and Kellogg Patent, No. 37,033.

The claim says that the crimper or blade is to crimp the goods and also to space the crimp. Now in the Crosby & Kellogg machine, after the crimp or plait was formed, the completed crimp or plait was pushed along for a certain distance by the blade, and thus the space was formed between the crimps. In the defendants' machine, the crimper or blade forms the crimp or plait and then tucks it or pushes it into the bite of the two rollers, which then revolve and do the greater amount of the spacing, but it is nevertheless true, that the blade while shoving the completed crimp into the bite of the rolls acted as a spacer to a certain extent, and to an extent which I deem sufficient to bring the defendants' two machines within the meaning of the *first* claim of the patent, for I do not find that the claim is limited to any particular amount of spacing, and I do not find that the claim would exclude mechanism substantially such as is there referred to, if such mechanism had additional spacing instrumentalities, which is the condition of the machines of the defendants.

Referring to both the Griffith and Fanning machines, and comparing them with the *second* claim of the Crosby and Kellogg patent, I find that both of the defendants' machines have a crimper or blade substantially such as is described in the complainants' patent, and which blade is specified to fold the crimps to an edge in combination with a smoother. Clearly the upper roll of the defendants' machine is the equivalent of the presser-foot of Kellogg and both of the defendants' machines, and therefore contains the invention of the *second* claim.

Referring to the 4th claim of complainants' patent, both of the defendants' machines have a crimper substantially such as is described in the patent, and one of them, to wit, the Fanning machine, has a spring which acts to force the blade upon the goods while crimping or plaiting them, and which blade relaxes its pressure upon the goods while it is retracting; therefore, there is no doubt, but that this machine contains the invention of the *fourth* claim.

As to the Griffith machine, it has not a spring as I have previously explained, but the operation of the blade is substantially the same, pressing upon the goods as it goes forward and relaxing its pressure as it retreats, and this result is obtained by mechanism, which I think is clearly the equivalent of that described in the Crosby & Kellogg patent, and consequently I think that the said Griffith machine contains the invention of the *fourth* (4th) claim of the complainants' patent.

As to the *fifth* claim, both the Griffith and Fanning machines have a crimper or blade, and a holder or holding mechanism in the shape of the two rolls, and both of the machines have also in my opinion the auxiliary smoother referred to in the claim, for in both of the machines, the upper-roll, which is the equivalent of the presser-foot, can yield bodily upwards, and is also provided with a yielding surface, so that if a piece of goods is passed through them, which piece of goods has thick edges, the edges will be held, and the crimps or plaits be smoothed both between the thickened edges and also at the thickened edges, where the surface of the upper-roll will yield, without necessitating an elevation of such portions of the upper-roll as grasp the thinner portion of the fabric. Consequently I think that both the exhibit Griffith machine and the Exhibit Fanning machine contain the invention of the *fifth* claim of the Crosby & Kellogg patent.

And being cross-examined by MR. WETMORE, says:

6 x-Q. You are to a considerable extent acquainted, are you not, with the prior state of the art to which the patent relates?

A. I am.

7 x-Q. Prior to the application for said patent it had been common, had it not, to form plaits or gathers in the cloth passing through the sewing machine by a reciprocating four-motion feed, which as it moves forward, gathers up the material into a gather or plait, the goods in front of the feed being held by the presser-foot, and, after the gather or plait is formed, the feed carries it past the needle, and returns to form the next plait or gather?

A. Yes.

8 x-Q. Was a blade a known equivalent for the serrated edges of four-motion feeds prior to the date of the Crosby & Kellogg application?

A. Yes, they were.

9 x-Q. Prior to that date were flexible blades used in automatic mechanisms to form creases or folds in cloth at given spaces. I refer particularly to the tape trimmer machines?

A. Yes.

And being further examined by complainant's counsel, says:

10 Re-d. Q. Would any of these machines form such plaits as can be formed by the Crosby & Kellogg machines?

A. No.

11 Re-d. Q. In your answer to cross-question 7, you say it had been common to form plaits or gathers in cloth, &c., by a reciprocating four-motion feed, and describe its operation. To what mechanism do you refer?

A. To the Arnold machine, having a feeding and gathering feed.

12 Re-d. Q. Do you find in the mechanism to which you have referred, any feed which passes the track of the needle or any plaiting or feeding device, which does so?

A. I do not. The gathering feed never passes the needle in moving forward, and the feeding feed never passes it while moving backward.

HENRY L. BREVOORT.

Sworn before me,
TIMOTHY GRIFFITH,
Examiner.

United States Circuit Court, Southern District of New York.

T. A. TUTTLE, Trustee &c.,
AGAINST
HORACE B. CLAFLIN, *et al.* } In Equity.

Testimony taken for final hearing on the part of the complainant, , by appointment and agreement of parties, under the 67th Rule in equity of the U. S. Supreme Court, as amended.

NEW HAVEN, CONN, Aug., 1879.

Present—C. B. STOUGHTON, ESQ., for Complainant; EDMUND WETMORE, ESQ., for Defendants.

SAMUEL E. BARNEY, a witness on the part of the complainant, having been duly cautioned and sworn, deposes and says in answer to interrogatories as follows, to wit.:

Int. 1. What is your name, age and residence?

A. Samuel E. Barney; 49; New Haven, Conn.

Int. 2. What was your occupation from 1860 to 1870?

Ans. I was engaged in the dry goods business part of that time, and during the whole of it acting as secretary and treasurer of the Elm City Company of New Haven, Conn.

Int. 3. What business did the Elm City Company carry on in 1850?

Ans. Manufacturing tape trimming and ruffles.

Int. 4. How were the ruffles manufactured during that time, by hand or machinery?

Ans. By machinery.

Int. 5. What kind of machinery.

Ans. Plaiting machinery like that patented by Crosby & Kellogg, Dec. 2d, 1862.

Int. 6. Can you state the number of the patent?

Ans. No. 37,033.

Int. 7. When did you see a machine constructed in accordance with that patent?

Ans. In July, 1860.

Int. 8. Where?

Ans. In the factory of the Elm City Company in Stafford's Building, New Haven, Conn.

Int. 9. How are you able to fix the time?

Ans. By the date of the Company's organization in June, 1860, on the fourth day the articles of association were signed, and it was about one month after that that we were manufacturing plaited ruffles, known as Victoria Ruffles, on the plaiting machines invented by Crosby & Kellogg. I also remember that it was the summer before the war.

SAMUEL E. BARNEY.

Subscribed and sworn to before me }
this day of August, 1879. }

JONATHAN INGERSOLL,
Examiner.

HENRY KELLOGG, a witness for the complainant, having been duly cautioned and sworn, deposes and says in answer to interrogatories as follows, to wit.:

Int. 1. What is your name, age, residence and occupation?

Ans. Henry Kellogg. Sixty. New Haven. Inventor.

Int. 2. Are you one of the inventors of the patent granted C. O. Crosby and Henry Kellogg, December 2, 1862, No. 37,033, for improvement in machines for frilling and crimping?

Ans. I am.

Int. 3. When did you first operate a machine constructed in accordance with the description contained in that patent?

Ans. I think it was in February, 1860.

Int. 4. Where was that?

Ans. It was in Dr. Crosby's office in Orange street (dental office), New Haven.

Int. 5. When was the machine completed?

Ans. Just about the same time.

Int. 6. Who was present when it was operated as you have stated?

Ans. Dr. Crosby. I am not certain as to the other parties, but I think Mr. Dexter Alden was there at some time.

Int. 7. How are you able to fix the date as in February?

Ans. It was about the time of the completion and first trial of the tape trimming machine, and there were negotiations going on for the sale of the tape trimming machine, which was subsequently sold to Winship & Barney, a portion of it.

Int. 8. How was this ruffling machine operated at Crosby's office, by hand or power?

Ans. It was operated the same as a sewing machine, by the foot and by hand.

Int. 9. And it was afterwards used in the manufacture of ruffling. If so, when first and where ?

Ans. It was subsequently set up in the Stafford Building, then occupied by the Elm City Company, some time in the month of June, 1860.

On the 26th of June, 1862, the application was made for said patent.

HENRY KELLOGG.

Subscribed and sworn to before me this day of August, 1879.

JONATHAN INGERSOLL,
Examiner.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee of the Elm City Company, Complainant,
AGAINST
HORACE B. CLAFLIN, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE and DANIEL ROBINSON, Defendants.

The answer of the defendants, Horace B. Claflin, John Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force and Daniel Robinson, constituting the firm of H. B. Claflin & Co. These defendants, now and at all times hereinafter, saving and reserving to themselves all and all manner of benefit of exception to the manifold errors, uncertainties and deficiencies of the bill of complaint, for answer thereunto, or to such parts thereof as they are advised it is necessary or material for them to make answer unto, answering, admit that they are copartners doing business at No. 140 Church street, in the City of New York, under the firm name and style of H. B. Claflin & Co.

And these defendants further answering on information and belief, deny that Chauncey O. Crosby and Henry Kellogg were the original and first inventors and discoverers of certain new and useful improvements in machines for producing folded trimmings or ever made any application for a patent therefor, or that the proceedings in relation thereto, in the said bill of complaint narrated, ever took place, or that any patent therefor was ever issued and granted to them, as in the said complaint set forth; but these defendants allege, on information and belief, that certain letters patent of the United States were issued to the said Chauncey O. Crosby and Henry Kellogg on or about the 2d day of November, 1862, for an alleged improvement in machines for Frilling and Crimping, which these defendants are informed and believe are the letters patent referred to in the said bill of complaint, and these defendants, on information and belief, deny that the said Crosby and Kellogg were the original and first inventors of the said improvement in machines for Frilling and Crimping, and have no knowledge or information

whether the said Crosby and Kellogg made application for said letters patent in due form of law, or whether the requirements of law in relation to the granting thereof were in other respects fulfilled, as set forth in said bill of complaint, and therefore deny the same.

And these defendants deny, on information and belief, that any such assignment as is set forth in said bill of complaint, was ever executed or delivered by the said Chauncey O. Crosby and Henry Kellogg to the Elm City Company.

And these defendants further answering, say, that they are informed and believe that there was a pretended assignment of the said letters patent for an improvement in machines for frilling and crimping, attempted to be made by said Crosby and Kellogg, to the said Elm City Company, but that the said assignment was utterly void under and by virtue of the laws of the State of Connecticut, and for the reason among others, that the said Crosby, at the time of the said pretended assignment was a director and president of said company and incapable of contracting with said company for the sale of his own private property thereto.

And the defendants further answering, say that they do not know and are not informed by said bill of complaint whether the said Elm City Company attempted to make a voluntary assignment in insolvency, as in the bill of complaint set forth, and they therefore deny the same, and leave the complainant to make such proof thereof as he shall be advised; but these defendants on information and belief allege that under and by virtue of the laws of the State of Connecticut, the said Elm City Company had no power or authority to make a voluntary assignment in insolvency, and that the same could only be made in violation of the statutes of said State in reference to involuntary insolvency proceedings and the dissolution of corporations; and that any conveyance to the complainant by virtue of such alleged voluntary assignment in insolvency was totally void; and these defendants deny that the complainant has or ever had any title to the said letters patent for improvement in machines for frilling and crimping, or to any patent owned by the said Elm City Company, or that he is the owner of said letters patent or of any patent as set forth in said bill of complaint.

And these defendants, on information and belief, further allege that the said Theodore A. Tuttle never filed a bond or complied with the Laws of the State of Connecticut in relation to the estates of insolvent persons; and that under and by virtue of said Insolvent Laws of the State of Connecticut, the title to Letters Patent of the United States do not pass to a trustee in insolvency, and no such title passed or was capable of passing by the alleged and pretended voluntary assignment in insolvency, as is set forth in said bill of complaint; and the defendants allege and insist that the said Tuttle, either as trustee or otherwise, is not entitled to the exclusive right to the inventions and improvements described in any Letters Patent granted to the said Crosby and Kellogg, and has no right or title whatever to maintain this suit.

And these defendants further answering, on information and

belief, deny that the said Elm City Company ever was or became a corporation or body politic under and by virtue of the Laws of the State of Connecticut, but allege that, as they are informed and believe, the said company claimed to become a corporation, solely by virtue of a certain certificate filed in the office of the Secretary of State for the said State of Connecticut on the 13th day of July, 1860, which certificate failed to comply with the requirements of law, in that, among other things, the said certificate did not truly state the actual amount of capital stock paid in, or the residence of its stockholders, nor was any duplicate thereof deposited with the Town Clerk of the Town of New Haven, nor any articles of writing made and executed, whereby in accordance with law any three or nine persons associated themselves together to form a corporation under the laws of the said State of Connecticut, and that said Elm City Company never had any corporate existence whatever.

And these defendants further answering, deny that the improvements alleged to be patented by the said Crosby and Kellogg, are of great or any value and importance, or that they have been extensively introduced into public use, or that the public generally have acquiesced in the complainant's alleged exclusive right to the same, or that the complainant and the said Elm City Company would, but for the alleged wrongful acts and doings of these defendants, and others acting in concert with them, have made large or any gains and profits and advantages from the manufacture, sale and use of said improvements so allegod to be patented and conveyed to the complainant as aforesaid.

And these defendants further answering, say that they are informed and believe that a suit was brought by the said Elm City Company against one George H. Wooster, in the Circuit Court of the United States, for the Southern District of New York, in or about the year 1870, which they believe to be the suit mentioned in said bill of complaint, and that in said suit a decision in favor of the complainant therein, affirming the validity of the said Letters Patent, granted to said Crosby and Kellogg for improvement in machines for frilling and crimping was rendered at or about the 30th day of June, 1873, but these defendants allege that said decision was rendered by said Court upon an imperfect knowledge of the facts, and that the defenses set up in this answer against the said patent, and the evidence in support thereof which these defendants will produce upon the final hearing herein, was not before the Court, or passed upon in said suit, and if the said defenses and evidence had been submitted to the said Court in the said suit, it would have been therein determined that the said letters patent were null and void.

And the defendants further answering, allege on information and belief, that in a certain other suit brought in the same Court by the said Elm City Company for an alleged infringement of the said patent, granted to said Crosby and Kellogg for an improvement in machines for frilling and crimping, a motion was made therein before the Honorable LEWIS B. WOODRUFF, for a preliminary injunction against the defendant in said suit, to restrain the use by said defendant of a so-called Chamberlain Side Plaiting Machine, the al-

leged use of which machine constitutes, as these defendants are informed, the infringement, to restrain which this suit is brought, and upon said motion, after a full hearing upon the merits, his Honor, Judge WOODRUFF, decided that said machine was not an infringement of said patent and refused said injunction, as by reference to the record of said suit in the Clerk's office of the said Court will more fully and at large appear.

And the defendants further answering say, that the said invention set forth and described and claimed in the said letters patent for infringement in machines for frilling and crimping, or material parts thereof, were known to or used by sundry persons in this country, and patented or described in printed publications long prior to the alleged invention or discovery thereof by the said Crosby and Kellogg, and that the following are the names of such persons, and the residences and the titles of such patents and publications, as far as known to these defendants at the time of making this answer, to wit: Andrew Campbell, who resides in the City of Brooklyn, at the City of New York; John Winke, who resides in the said City of Brooklyn, at the said City of New York; ——— Bodenstein, whose first name is unknown to these defendants and who, to the best of defendants' knowledge, resides in Germany, at said City of New York; Joseph Thomas, who resides in Hoboken, New Jersey, at said City of New York; ——— Stockmar, who resides in Jersey City, New Jersey, at said City of New York; ——— Walker, deceased, at the said City of New York; ——— Penman, deceased, and ——— Fitzgerald, deceased, and ——— Thompson, deceased, all at said City of New York, at the place of business in said city, of the former firm of Walker and Penman; ——— Dane, Jr., who resides in the City of New York, at the City of Lowell, in the State of Massachusetts; Edward Husson, deceased, at said City of New York; ——— Wuterich, who resides in Brooklyn, at said City of New York; Weilwood Murray, who resides at , in the State of California, at the said City of New York; Madame LeBlanc, who resides in the City of New York, at the said City of New York; Luther Hall, who resides in the City of Boston, at the Town of Chelmsford, in the State of Massachusetts; ——— Kurchedt, who resides in the City of New York, at said City of New York; H. C. Chittenden, whose present residence is unknown to the defendants, at the City of New Haven, Connecticut, and Winchester & Davis, who reside in said City of New Haven, at said city; John H. Pipo, Theodore G. Kelly, Edgar Carey, Alexander Douglas, Samuel Sherwood, Bryan Knickerbocker, Samuel Frischet, ——— Papper and George E. Allen, all of whom reside in the City of New York, at the said City of New York; Thomas Robjohn, who resides on Staten Island, at the said City of New York; and also by numerous other persons, whose names and residences are now unknown to these defendants, but which, when known, the defendants pray leave by proper amendments to insert in this answer; and the said patents are as follows: Letters Patent of the United States, issued to Isaac M. Singer, dated March 18th, 1856, numbered 14,475, for an improvement in sewing machines; Letters Patent of the United States, to

George B. Arnold, dated May 8th, 1860, numbered 28,139; Letters Patent of the United States to George B. Arnold and Alfred Arnold, dated September 25th, 1860, numbered 30,112; Letters Patent of the United States to Chauncey O. Crosby and Henry Kellogg, dated August 5th, 1862.

And the defendants further answering on information and belief, aver that the said invention for the improvement in machines for frilling and crimping was in public use and on sale in this country for more than two years before the application for a patent therefor, with the consent and allowance of the said Crosby and Kellogg.

And these defendants further answering deny that, at the City of New York, or elsewhere, without the license or permission of the complainant, they have or either of them has, since the first day of January, 1870, or at any time, unlawfully and wrongfully made or caused to be made or used and sold, or caused to be used and sold, machines and mechanism embracing and containing the invention and improvements, or any of them, set forth and described in said letters patent, or in the pretended letters patent in said bill referred to and set forth as the invention of said Crosby and Kellogg, or that these defendants or either of them, have violated or infringed any exclusive rights or privileges of, or vested in, the complainant whatever, or that they have inflicted any damages upon the said complainant or the Elm City Company, or that they have realized any gains or profits by reason of such alleged infringements.

Wherefore, these defendants deny the equity of said complainant's bill, and that the complainant is entitled to the relief in said bill prayed, or any part thereof without this, that there is any other matter, cause or thing in said bill of complaint contained material or necessary for the defendants to make answer unto, and not hereinbefore sufficiently answered, confessed, traversed, denied or avoided, is true to the knowledge or belief of these defendants.

Wherefore, these defendants pray that they may be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

H. B. CLAFLIN,
EDWARD E. EAMES,
H. J. FAIRCHILD,
By D. N. FORCE, Atty.
W. S. DUNN,
D. N. FORCE,
DANIEL ROBINSON.

VANDERPOEL, GREEN & CUMING,
Defendants' Solicitors.
EDMUND WETMORE,
Of Counsel.

UNITED STATES OF AMERICA,
State of New York,
City and County of New York, } ss.:

H. B. CLAFLIN, EDWARD E. EAMES, WILLIAM S. DUNN, DEXTER N. FORCE, DANIEL ROBINSON, being severally duly sworn, say, and each

for himself says that the foregoing answer is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

H. B. CLAFLIN,
EDWARD E. EAMES,
W. S. DUNN,
D. N. FORCE,
D. N. FORCE,
DANIEL ROBINSON.

Sworn and subscribed before me this 7th day of October, 1878.

[L. S.]

W. H. HUMPHREY,
Notary Public,
Kings and N. Y. Counties.

41 United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, &c.,
vs.
HORACE B. CLAFLIN and o'rs.

Testimony taken for final hearing for and on behalf of the defendants, in pursuance of the Sixty-seventh Equity Rule.

NEW YORK, Nov. 10th, 1883.

Parties meet pursuant to notice:

Present:—CHARLES B. STOUGHTON, ESQ., on behalf of the complainant; EDMUND WETMORE, on behalf of the defendants.

It is hereby stipulated that the following deposition taken and sworn to before John H. Ives, a Notary Public, may be received and read in evidence with the same force and effect as if taken before one of the examiners of this Court.

CHARLES G. CURTIS, a witness produced on behalf of the defendants, being duly sworn and examined, testified as follows:

1 Q. What is your age, residence and occupation?

A. Charles G. Curtis; twenty-three; New York City; mechanical and civil engineer.

2 Q. What experience have you had in the study and practice of mechanics, especially with respect to sewing machines and their appliances?

A. I received a technical education at the Columbia College School of Mines in the Department of Civil Engineering, and received the degree of Civil Engineer in 1881. During the four years' course there, and for some years previous, I was constantly engaged in observing, investigating and experimenting with apparatus and machinery of every description, independently of that met with in the regular course of civil engineering, which embraced a pretty fair study of machines of all kinds. Since that time I have been in the habit of examining both professionally and otherwise, machinery of various descriptions, especially with a view to questions relating to

patents; have been giving expert testimony in patent suits and preparing patent specifications and claims. I have seen sewing machinery working a great many times, have operated upon sewing machines myself frequently, and have been very familiar with such machines for ten years or more.

3 Q. Have you read and do you understand the specification of the Crosby & Kellogg patent in suit?

A. I have carefully read the specification and claims of that patent, and understand the mechanism therein described.

4 Q. Please state what you understand to be the invention therein described.

Adjourned to Tuesday, December 14th, 1883, at 2 o'clock.

A. The Crosby & Kellogg specification describes an attachment to a sewing machine, for frilling or crimping textile fabrics. In the language of the patent the invention "consists essentially of two "parts, the one for forming the crimps, and the other for securing "them in place after they are formed, the latter being any ordinary "mechanism for making stitches." The attachment for forming the crimps consists of a reciprocating blade, arranged in front of the presser foot, and having its front edge caused to vibrate to and fro in front of and under the presser foot, by being connected to a rock shaft actuated by two cams mounted on the shaft or spindle of the sewing machine. This reciprocating blade or *crimper* is pressed down, while it is approaching the presser foot, by an arm called a *crimper-presser*, attached to a second rock shaft, and forced down upon the crimper by means of a spring. When the blade or crimper is retreating, a third cam on the spindle of the machine acts to raise the crimper-presser, so as to relieve the pressure on the crimper. A strip of material to be crimped having been laid upon the platform under the presser foot and under the crimper, the needle or needles being in the cloth, and the crimper having retreated to the end of its stroke, the machine operates as follows:

The front edge of the crimper, being pressed upon the goods by the crimper-presser, takes hold of the goods, and as it advances makes a loop or gather, or "crimp" of the cloth lying between it and the front of the presser foot; the cloth under the presser foot being held stationary by the spring pressure on the foot. The needles then leave the cloth and the other cam acts upon the crimper and pushes or tucks the crimp or gather just made under the presser foot, at the same time carrying along with it or in front of it the cloths and crimps already under the presser foot. The crimper now pauses, and the needles enter behind the crimp just formed, in order to sew it and hold it down flat; after which the crimper-presser is raised from the presser foot, so as to relieve the crimper from the spring pressure, in order that the crimper may slide back without rucking up the goods. The crimper is then drawn back, ready to make a new crimp or loop.

In the operation of this machine the blade or crimper first acts to form the cloth into a loop in front of the presser foot, and then to push the crimp thus formed through the machine under the presser foot, together with the cloth and crimps already formed under the presser foot; the crimper thus serving to feed the cloth through the

machine (and also to space the crimps apart) as well as to form the loops in front of the presser foot.

The specification also describes an attachment to the presser foot, consisting of a springy piece of metal screwed down on top of the presser foot, and having two wings bearing upon the table, similar to that of the presser foot itself, their object being to smooth or flatten the part of the frill which projects on either side of the presser foot.

5 Q. Have you examined the machines used by the defendants and known as the "Griffith" and "Fanning" machines respectively; and if yea, will you please briefly describe the said machines, compare them with the claims of the Crosby and Kellogg patent in suit, and state whether or not, they, in your opinion, contain the inventions described in said patent, and particularly pointed out in the claims thereof, or any of them?

A. I have examined those machines as to their construction and operation. The Griffith and Fanning machines are machines for plaiting alone, without the aid of any sewing mechanism. The Griffith machine consists of two rollers geared together, and caused to revolve intermittently by suitable ratchet mechanism connected to a shaft to which the power for working the machine is applied. In front of the rollers is arranged a reciprocating bar to which is attached a plaiting blade of the same length as the rollers. The ends of this bar slide in horizontal slots with more or less friction, according to the adjustment of the friction guides, and they carry two cranks set at right angles to the blade. The end of each of these cranks is connected by a connecting rod to an adjustable crank attached to the end of a revolving shaft which receives motion from the same shaft that actuates the rollers. For convenience, a flat table or platform is generally used to guide the strip of material to the point where it passes through the rollers.

The end of a strip of goods being inserted between the rollers, the operation of the machine is this: The edge of the plaiting blade is rocked down upon the goods by pressure applied to the upper ends of the cranks, on account of the friction in the sliding slots, but as the edge of the blade cannot descend further, the whole blade, and with it the cloth, is carried along by the connecting rods, until it reaches the bite of the rollers. As the strip of cloth is held fast between the rollers, this advance motion of the blade forms the cloth lying between it and the rollers into a loop or unflattened plait lying on top of the blade. When the blade has thus delivered one edge of the plait to the bite of the rollers, the rollers are caused to rotate, and the plait is passed bodily between them, coming out on the other side perfectly formed and creased. In the meantime the connecting rods have been drawn back, first rocking the blade and raising its edge clear of the goods, and then drawing back the blade to the end of its stroke, ready to form another plait.

The construction of the Fanning machine is substantially the same, with the exception of the mechanism for reciprocating the plaiting knife, which I shall speak of in discussing the claims of the Crosby and Kellogg patent.

I will now compare these machines with the mechanism I have found described in the Crosby and Kellogg patent.

FIRST. The Crosby and Kellogg invention is an *attachment to a sewing machine*, for forming crimps or frills in a narrow strip of material under the presser foot of a sewing machine, where they are sewed flat by the usual stitching mechanism. It forms these crimps by means of a reciprocating blade which loops up the strip into a crimp or gather, and then pushes it along under the presser foot, while the crimp is being stitched down flat by the needle in the usual way. The strip crimped must be very narrow, not materially wider than the presser foot wing, and the small narrow crimps made by this machine bear but little resemblance to the broad regular plaits made by the Griffith and Fanning machines.

The Griffith and Fanning machines, on the other hand, are machines for doing nothing but plaiting, and are constructed to plait a broad strip of goods with plaits of any desired width, and to turn out such a strip so *pressed* that will remain plaited, without the aid of any sewing mechanism. I do not think the Crosby and Kellogg attachment could be made of any practical use in crimping, without the aid of the sewing mechanism, because the spring pressure which it would be practicable to use on the presser foot would not be sufficient to press and *crease* the crimps, so that they would remain crimped after leaving the machine. Certainly this pressure would not be sufficient to so crimp the kinds of material used for this purpose. It is found necessary in the Griffith and Fanning machines, in order that the plaits may not become obliterated on leaving the rollers to subject the cloth to a very heavy pressure between the rollers, and also to have the rollers heated. This pressure is obtained in the Griffith machine by means of two screws for adjusting the downward pressure on the journals of the upper roller, as in an ordinary clothes-wringer; and in the Fanning machine by means of a bow-shaped lever bearing upon the journal boxes of the upper roller, and carrying a heavy weight at its free end. The upper roller has a surface of rubber, and the lower roller, the surface of which is of iron, is heated internally by gas jets in both machines. This passing of the cloth under great pressure between heated rollers is found to be absolutely necessary, in order that the plaits may remain creased after leaving the machine, a great pressure alone not being enough with many materials (such as woolen goods). I think, therefore, that the crimps, after being subjected to the slight pressure of the Crosby and Kellogg presser foot, would immediately straighten out and lose their shape, unless sewed down by the needle. The presser foot flattens and lays the crimps so that they can be sewed by the needle to the extent that a presser foot usually flattens cloth; but it does not effectually *crease* the cloth so that it will remain crimped, as do the Griffith and Fanning machines. Consequently, I conclude that the Crosby and Kellogg attachment would be of no use without sewing mechanism, even for forming the little narrow crimps which it can form. Evidently the Crosby and Kellogg crimping contrivance was not intended to be used without sewing mechanism, as the specification does not contain even a suggestion to the effect that it could; but distinctly states that they

intended to use "any proper sewing mechanism, in place of that shown."

SECOND. The crimper or reciprocating blade of the Crosby and Kellogg machine performs a different function, and operates in a different way from the broad plaiting blades of the Griffith and Fanning machines. The Crosby and Kellogg crimper after forming the loop in front of the presser foot, is made to advance still further, and push the crimp and cloth along under the stationary presser foot and thus to feed the goods through the machines; whereas in the Griffith and Fanning machines, the reciprocating blade, after delivering one edge (of the plait) to the bite of the rolls, retreats, and the plait, instead of being shoved through by the blade, is caught by the revolving rolls, and passed bodily between them, flattening and pressing the cloth sufficiently for the plaits to remain creased, after leaving the machine, without requiring any sewing. In the Crosby and Kellogg case, the crimper feeds the goods through the machine. In the other case, the plaiting blade only forms the loop, the feeding being done by the rollers; which, in my opinion, is an essential difference both in construction and operation.

THIRD. In the Crosby and Kellogg machine, the crimper pushes through the lower part of the loop under the presser foot, the friction between this part of the plait and the cloth lying above it being relied on to slide the upper part of the loop along under the foot. But if the under side of the foot should happen to be rusty or rough from any other cause, the crimper would either form no plait at all, or else it would form one wider than was intended. Whereas, in the Griffith and Fanning machines, this could not happen, because after the loop is formed, the rolls take hold of the plait, and pass it between them with a rolling motion, without the possibility of the plait slipping upon itself, and losing its shape.

FOURTH. An essential part of the function of the Crosby and Kellogg crimper is also to "space the crimps apart," which results from the way it feeds the goods through the machine. The specification says, "the space between the crimps depends upon the length of the advance of the crimper after the crimp is formed." But in the Griffith and Fanning machines the spacing is not done by the plaiting blades. It is done entirely by the revolving rolls, which, after each plait is formed, advances the cloth, while the blade is retreating, through a distance equal to the space between successive crimps.

Such being the differences in construction and operation between these machines, and the Crosby and Kellogg crimping machines, of course I do not think that either of them is the machine described in Crosby and Kellogg's specification.

I have considered the identity of the Crosby and Kellogg and the two other machines, thus far, without reference to the claims in the Crosby and Kellogg patent, because the first two claims, which are the chief ones in controversy, are so drawn as to amount, in my opinion, to little more than saying, "We claim substantially the machinery described in our specification." Complainant's expert,

though he did not mean it in that sense, aptly expressed it, when he spoke of the invention as being "*referred to* in the claims."

The *first* claim calls for a crimper acting substantially as described, to crimp goods and to space the crimps, in combination with a table or platform and a holding mechanism or holder, substantially such as described, the combination acting substantially as specified; and we claim these also in combination with either one " or two mechanisms for making stitches."

The Griffith and Fanning reciprocating blades in plaiting its strip of goods cannot be said to be a crimper, acting in substantially the same manner as the Crosby and Kellogg crimper, in crimping its strip of goods. To act in substantially the same manner is to perform the same function in the same way. The operation of the crimper in the Crosby and Kellogg machine includes its function of pushing the goods through the machine under a stationary presser foot, as well as its function of forming the crimps or loops in front of the presser foot. Feeding the goods through the machine is just as essential a part of its operation as the other part.

The claim also requires that the crimper should space the crimps. The Griffith and Fanning plaiting blades neither feed the goods through the machine, nor act to space the crimps in any way. The feeding and spacing is effected entirely by the revolving rolls.

As to the roller-feeding contrivance of the Griffith and Fanning machines, it is essentially different, both in its construction and mode of operation, from the holding mechanism or holder—viz.: the table and presser foot—of the Crosby and Kellogg machine. It does not hold the goods, while the crimper forces them through; it takes hold of the plait which is delivered to it by the blade, and passes the whole thing bodily through with a rolling motion, without the assistance of the blade; and it creases it, so that it remains creased after leaving the machine. Finally, the combination does not operate in substantially the same way. Consequently, even if the mechanism for making stitches, which in my opinion is necessary to make the machine do any useful crimping, were construed out of this claim, I should not think either the Griffith and Fanning machine contained the mechanism claimed in the first claim.

The *second* claim calls for "a crimper and smoother, substantially " such as described, and acting substantially as specified, to fold the " crimps to an edge." I do not see any material difference between this and the first claim. The plaiting blades of the Griffith and Fanning machines are not, in my opinion, substantially the same as the Crosby and Kellogg crimper. Their rollers are of essentially different construction, and they flatten and crease the plaits in a different way from the smoother of the Crosby and Kellogg patent, and the two do not together operate substantially as specified in that patent, for the reasons I have already given. Hence they do not come within the second claim.

The *third* claim is not in issue.

The *fourth* claim calls for, " in combination with a crimper, " substantially such as specified, a spring acting to force said " crimper upon the goods while crimping them, and relaxing its

" pressure while the crimper is retreating, *substantially in the manner* " and for the purpose specified."

In the Crosby and Kellogg machine, the spring acts upon the crimper indirectly through the medium of a crimper presser, which is pressed by the spring upon the crimper, while crimping, and is lifted off the crimper while it is retreating by means of a cam, thus relieving the crimper from the spring pressure. The Fanning machine does not operate in this way. A spring is used which acts directly and continuously upon the blade itself, and the blade, instead of being simply relieved of the spring pressure and allowed to drag back by its own weight upon the cloth, is itself lifted off the goods by a cam and rocking elbow which acts upon a little roller on the end of a toe secured to the reciprocating bar carrying the plaiting blade. This construction causes the acting edge of the blade to be raised clear of the cloth on its back stroke, instead of bearing upon it by its own weight, as in the Crosby and Kellogg machine. The Crosby and Kellogg machine simply relieves the crimper from the pressure of the crimper presser. The Fanning machine does not relieve the blade from the spring pressure, but raises the blade entirely clear of the goods. Unless, therefore, the Court shall so construe this claim as to cover such a reciprocating blade as is used in the Fanning machine, and any mechanism for causing the blade to bear upon the goods while advancing, by means of a spring, and for relieving the pressure of the blade upon the goods while retreating, whether such mechanism " act in the manner specified " or not, I should not think the Fanning machine contained the mechanism embraced in this claim.

The Griffith machine does not make use of a spring " to force " said crimper upon the goods while crimping them and relaxing its " pressure while the crimper is retreating." The edge of the blade is made alternately to bear upon and rise off the cloth in an entirely different way without the use of any spring. The moving force is applied to the blade at the extremities of two cranks attached to the ends of the bar which carries the reciprocating blade. The effect of this construction is to rock the blade and make its edge press upon the cloth before the blade begins to advance, and similarly to relax the pressure of the blade and to raise it off the cloth as it retreats. Therefore, I do not think this machine contains the mechanism of the fourth claim.

The *fifth* claim calls for " an auxiliary smoother, having a mode " of operation substantially as specified," &c. I have not been able to find any auxiliary smoother, in any sense, in either the Griffith or Fanning machines. There is but one smoothing contrivance in these machines, namely, the rollers, so that these machines do not come within the fifth claim.

CHARLES G. CURTIS.

Attest:
JOHN H. IVES.

The machines referred to by the witness are put in evidence and marked " Defendant's Exhibit Fanning Machine, J. H. Ives, Ex-

aminer," and "Defendant's Exhibit Griffith Machine. J. H. Ives, Examiner," respectively.

NEW YORK, January 22, 1884.

Parties met pursuant to consent.
Present—Counsel as before.

CROSS-EXAMINATION OF CHAS. G. CURTIS BY MR. STOUGHTON:

6 x-Q. Have you ever seen a machine constructed in accordance with the description contained in the Crosby and Kellogg patent?

A. I have seen such a machine in the Clerk's office of the U. S. Circuit Court of New York.

7 x-Q. When, and was it in operation?

A. Sometime, I think, in the early part of October. It was not being operated upon then regularly, but I operated upon it myself sufficiently to satisfy myself that it was substantially the machine described in the Crosby and Kellogg specification.

8 x-Q. Was this machine susceptible of adjustment, so that the crimper would form the plait only and not push it along after it had been formed?

A. It was susceptible, of course, of being so arranged by entirely removing the second cam, which operated to combine the advance of the crimper after its front edge had reached the presser foot. I believe it was also adjustable, as is the machine described in the patent by changing the position of the proper arm on the rock shaft which rotates the crimper in order to vary the stroke of the crimper while working under the presser foot. That is, the arm could be so set on the rock shaft that the cam would cause no further advance of the crimper after it had reached the presser foot, but if it were adjusted to do this, this cam would not act at all, unless it was made to act in conjunction with the other, in which case it would serve no purpose. Of course the same effect would be obtained, as I said before, without any such cam.

9 x-Q. With this second cam removed or adjusted as you have stated, would the machine operate to crimp goods?

A. No, it would not operate, because there would be nothing to feed the goods through the machine under the presser foot.

10 x-Q. Did you try it?

A. No; certainly not.

11 x-Q. In the Fanning and Griffith machines, does the crimper push the goods between the rollers in forming the crimp?

A. No, it does not. It does not push the goods into the rollers at all. It forms the plait at the bite of the rolls, and the formation of the plait is not completed until one of its edges is delivered to the bite of the rolls. The plaiting blade has nothing whatever to do with the feeding of the plaits through the machine between the rolls. If it were not for the feeding action of the rolls, that is, if the rolls remained stationary, there would be no space between the successive plaits formed by the blade. I find that complainant's expert speaks of the Fanning and Griffith blades as acting

to push the plait through the rolls to some extent. I do not know what he means by this. The most superficial inspection of both machines shows clearly that the plaiting blades have nothing to do with the feeding of the goods through the machine and consequently with the spacing of the plaits.

12 x-Q. Where does the plaiting braid in the Fanning and Griffith machines stop in its forward movement in forming the crimp or plait; isn't it at the point of contact between the two rollers and in what you call the bite?

A. No; it does not advance as far as that. It stops just behind the line of contact with the rollers, with enough space between its edge and each of the two rolls to allow of the thickness of the blade edge itself and the cloth lying above and below it. It is immaterial as far as any feeding of the blade is concerned how far the blade advances into the bite of the rolls, because the plait itself is not formed until the advance motion of the blade ceases. That is, the formation of the plait continues until the blade stops. If a plaiting blade were to advance farther than this, if it penetrated the bite of the roll, it would cut the cloth. This is one of the very difficulties that the operator of the machine has to guard against in adjusting the blade. The blade would not only cut the cloth, but would be caught by the rolls and carried through the rolls with the cloth. In practice some strips have to be thrown away because the blade has cut them by entering the rolls too far. There is not the smallest room for doubt as to the working of the plaiting blades in this respect, and it is one of the great advantages of this form of contrivance for plaiting that there is no slipping of the cloth on the surfaces of the rolls, but the cloth and plait is passed through with the rolling motion.

Examination adjourned to January 23, 1884, at 11 o'clock A. M.

NEW YORK, Jany. 23, 1884, 11 o'clock A. M.

Parties met pursuant to adjournment.
Present—Counsel as before.

CONTINUATION OF THE CROSS-EXAMINATION OF CHAS. G. CURTIS:

13 x-Q. What functions do the rollers perform in the Griffith and Fanning machines while the plait is being formed and before they feed it along?

A. They perform the function of holding the cloth stationary a certain distance in front of the plaiting blade, while the plaiting blade loops up the cloth in the plait.

14 x-Q. Wherein does the function performed by the upper roller in the Griffith and Fanning machines, differ from the action of the presser foot in the Crosby & Kellogg machine, while the plait is being folded to an edge?

A. While the loop is being formed, if that is what you mean by folding to an edge, the functions of the two are the same.

15 x-Q. Wherein does the function performed by the lower roller in the Griffith and Fanning machines differ from the function performed by the table in the Crosby & Kellogg machine during the

folding of the plait, I mean that part of the table directly under the presser foot ?

A. There is no difference as far as this function considered entirely by itself is concerned, between the machines compared in the question, provided the plaits made by the machine are so short that the edge of the plaiting blade takes hold of the cloth on the surface of the lower roll, but in making longer plaits a table is generally used, while the plaiting blade slides back over and upon which the blade presses when it takes hold of the cloth. Whether the blade rips the cloth by pressing upon such table or by pressing directly upon the lower roll depends, in practice, upon how long plaits the machine is adjusted to make.

16 x-Q. Will the Griffith and Fanning machines plait strips of cloth very narrow, say less than one-quarter of an inch in width ?

A. Certainly it could plait strips of any width provided the edge of the blade is straight enough to take hold of a narrow strip.

17 x-Q. Answer as to exhibits Fanning and Griffiths ?

A. I should think they would, yes ; without examining them carefully. If they would not it would be only because the blade was out of shape or the machine not properly adjusted.

18 x-Q. What is the object of the spring which presses down the upper roller in the Griffith machine ?

A. It is to produce a downward pressure on the upper roller and at the same time to permit of a slight rise of the upper roller in case anything thicker than the ordinary cloth fed through the machine should get in between the rolls. It thus allows the upper rolls to yield slightly, preventing injury to the rolls in the first place, and in case the hem, if there were any of the strip plaited, should be too thick, to prevent injury or cutting the hem by too great pressure. But with the pressure on the roll properly adjusted for any particular kind of material or strips this yielding capacity would not be necessary.

19 x-Q. Why is the upper roller made of rubber or elastic material in the Griffith and Fanning machines ?

A. The upper roller has a rubber surface for two reasons : first, because it grips the cloth much better than if it were like the under roller, and second, because it allows the hem the thickness of which is greater than the rest of the strip to sink slightly into its surface, so as to bring the roll in contact with the cloth along the whole length of the rolls, or at least the width of the cloth ; of course, it also allows for other possible irregularities in the thickness of cloth.

20 x-Q. As I understand you, then, the upper roller in both machines flattens the plaits by pressure upon the goods, while the completed plait is being passed between the rollers ?

A. Certainly it does ; only I should hardly speak of the plait or loop " being completed " until it had passed through the rolls.

21 x-Q. What is the object of relieving the pressure of the crimper upon the goods in its backward movement in the Crosby & Kellogg, Griffith and Fanning machines ?

A. To prevent the crimper from injuring the cloth or its surface by the scraping edge of the blade, or as the patentee says, to avoid " rucking up the cloth."

22 x-Q. What do you understand the meaning to be of the expression "smoothing down or flattening the crimp by its spring pressure upon the goods," on the second page of the Crosby & Kellogg Patent?

A. I understand that as the impressed plait or loop is tucked through under the presser foot, the spring pressure upon this foot holds it down with a certain tension, and lays the plait flat upon the crimper blade, after the crimper is withdrawn, a spring forces the presser foot down a trifle further, and then the front edge of the plait becomes creased by this pressure as much as the machine creases it at all.

23 x-Q. What function does the rough surface feed perform in the Crosby & Kellogg machine?

A. This rough surface feed as described in the patent is only used as an additional means of forcing the crimp under the presser foot when there is a heavy pressure on the foot. It simply assists the feeding action of the crimper, after the crimper has pushed the plait or plaits as far through as it is adjusted to do, such a feed would be of no use to act upon the cloth until it had got beyond the reach of the crimper.

24 x-Q. Suppose the crimper was so adjusted as to deliver the plait into the bite of the presser foot and table and not advance further—what function would the feed then perform in the Crosby & Kellogg machine?

A. It would simply perform the function of forming the loop—nothing more.

25 x-Q. I mean the under rough surface feed?

A. I can imagine an arrangement of the four-motion feed with respect to the front edge of the presser foot and an adjustment of the crimper so that the four-motion feed would take the front edge of the loop off the crimper at the instant the crimper reached the edge of the foot, in which case, of course, a crimper would do no feeding—it would simply form the loop; but that would be an entirely different construction from anything that is described in the patent, and in such construction a rough surface feed would do all the feeding alone; it would hardly be a means of feeding, additional or auxiliary, to the crimper. The patent says nothing about such a construction, and it has only occurred to me after thinking over all the possible forms of mechanism that I could. You could not gather it from the patent; nor would the crimper, in such a case, have anything to do with the spacing of the crimps, as does the crimper described in the specification and as specified in the claim. This construction might also be objectionable for other reasons.

26 x-Q. I mean to ask you to consider the crimper in the Crosby & Kellogg machine, as shown in the drawing, to be so adjusted by means also shown in the patent as to deliver the plait just under the front edge of the presser foot and from that point to retreat backward—the feed being adjusted to have a long throw. What function would the feed then perform in the Crosby & Kellogg machine?

A. Yes, and I have considered it exactly that way. The patent does not show or describe any such adjustment of the crimper, nor does it state how the four-motion feed would act or would be ad-

justed in case the feeding was not done by the crimper. Of course, it would be possible to remove the cam which drives the crimper through under the presser foot, or what would be the same thing, to adjust it so it would not act, but if you were to do this you would not have the mechanism described in the specification, simply because the crimper would not act, as it does in the specification, and if a rough surface feed were made to do all the feeding it would not act as an aid to the reciprocating crimper in feeding.

RE-DIRECT EXAMINATION BY MR. WETMORE :

27 Re-d. Q. Do the Griffith or Fanning machines, or either of them, require to have either or both of the rolls heated to enable them to form plaits in all or some cases ?

A. Yes, they do with probably most materials which the machines are generally used to plait. Both rolls are usually heated. Some woolen goods would lose their shape almost entirely without the application of heat while under pressure.

RE-CROSS-EXAMINATION :

28 Re-x-Q. In plaiting what kind of goods do you require one or both rollers heated ?

A. Cassimere or Merino goods are probably plaited on those machines more than any other material, and heating of one or both the rolls is necessary in plaiting them.

29 Re-x-Q. Can you mention any other kind of goods which would require both the rolls to be heated ?

A. Silk is a very difficult material to crease. Almost any thick material would probably require heating.

30 Re-x-Q. Do you mean dressed or unfinished silk ?

A. I mean finished silk ; that is, such silk as ladies' dresses are made of.

31 Re-x-Q. Ladies use both dressed and unfinished silk for dresses. Which kind do you mean ?

A. I mean finished silk.

32 Re-x-Q. Would unfinished silk require heating ?

A. I do not exactly know what you would include in the term unfinished silk.

33 Re-x-Q. I understand you to say that some goods require one or both rollers to be heated in order that the goods should retain the plaits as made by the Griffith or Fanning machines, and that some goods do not require it. Am I correct ?

A. I do not know as a matter of fact that there are any goods which would be so plaited without heating the rolls. The rolls have always been heated in the case of the materials which I have known of being plaited, but of course very thin, stiff material, such as starched cambric for example, would remain sufficiently creased after plaiting without any heating. I have never seen such material tried on a machine, but I have no doubt but that it could be done. Such materials, however, are rarely plaited on machines.

34 Re-x-Q. How about muslin, linen and such fabrics?

A. I have never tried muslin or linen, or seen it tried, but I think if it were not very thin and perhaps starched heat would be necessary, although of course, for some purposes, the plaits would be perfectly enough pressed to answer.

35 Re-x-Q. You only want the goods to remain created as plaited after passing through the Griffith or Fanning machines until the plaits can be stitched in place, do you?

A. Certainly; but the plaits are already pressed when they come out of the machine, and plaited material often has to be cut out, taken to another shop before it is used or before it is sewed flat. A large amount of plaiting is done to order, and the plaited material is often used without being sewed flat at all. Such plaited material is often made and sold as a regular article of manufacture without being sewed at all.

36 Re-x-Q. Where did you ever see such a thing for sale?

A. I have seen some bought by ladies a short time ago, and I know that it is a common thing for ladies to take material and have it crimped to order on such machines.

37 Re-x-Q. What did they do with it afterwards?

A. It formed parts of dresses.

38 Re-x-Q. And the plaits were stitched in place, in use, were they not?

A. No, they were not. Those that I refer to formed, I think, the bottom of the skirt and were not sewed at their lower edges. They were sewed flat, I believe, at their upper edge.

CHAS. G. CURTIS.

Attest:
JOHN H. IVES,
Notary Public.

NEW YORK, January 26, 1884.
1 o'clock P. M.

Parties met pursuant to adjournment.
Present—Counsel as before.

CHARLES G. CURTIS, recalled on behalf of the defendants, testifies as follows:

Q. Since the last hearing have you had specimens of the plaiting done by the Griffith and Fanning machines, made on either of the machines; if so, will you please produce the said specimens and describe the same?

A. I have had several plaitings made on the Griffith machine, which I hereby produce.

Specimens produced and marked Defendants' Exhibits Plaitings A., B. and C.

Exhibit A. is a piece of cassimere plaited in the regular way. Exhibit B. is a piece of silk similarly plaited—that is, with the rollers heated. Exhibit C. shows the effect of having the plaiting

blade adjusted so as to enter between the rolls too far, which results in cutting the hem of the strip, as I have described.

CHARLES G. CURTIS.

Attest:

J. H. IVES.

WILLIAM FERGUSON, a witness produced on behalf of the defendants, being duly sworn and examined, testifies as follows:

1 Q. What is your name, age, residence and occupation?

A. William Ferguson; 47 years of age; residence, 435 West Seventy-third street; manufacturer.

2 Q. Were you formerly in the employ of H. B. Claflin & Co., the defendants herein, and if so, during what period and what were your duties in their establishment?

A. Yes; from 1872 to 1882. Manager of the suit and cloak department, which included the manufacture of those goods.

3 Q. Were the Fanning and Griffith plaiting machines, which are the subjects of this suit, used in your department exclusively?

A. Yes.

4 Q. Did you buy these machines for the firm, and if so, of whom?

A. Yes; first of Fanning and then of Griffith, the makers of those machines; and they were machinists.

5 Q. At the time you bought those machines and from that time up to the time when you received written notice from Mr. Stoughton that a claim was made that the machines infringed the Crosby & Kellogg patent, did you receive any notice from any one of the existence of the claim against the defendant's firm for alleged infringement of the said patent by use of those machines?

A. No.

6 Q. And what did you order done with the machines when you ascertained that claim was made that they were infringements upon the said Crosby and Kellogg and other patents?

A. I ordered them to immediately stop using.

7 Q. And were those orders carried out?

A. Yes, sir.

8 Q. And in the regular course of business of the defendant's firm, would any notice served on the firm or communication delivered to them with reference to said machines be sent to you?

A. It would at once.

9 Q. And during the time that the machines were used at Claflin & Co., and under your direction until the notice preliminary to this suit, and you ordered the discontinuance of the machines, what was the fact as to their being used in good faith and without knowledge on your part, or as far as you know of any of the defendants, of any of the defendants, of any claim that the said machines were an infringement of the Crosby and Kellogg patent?

A. We had no knowledge of any claims under that patent.

WM. FERGUSON.

Attest:

JOHN H. IVES.

TUTTLE, Trustee, &c., }
vs.
CLAFLIN and OTHERS. }

WALLACE, J.:

The complainant's patent (No. 37,033, Crosby & Kellogg, patentees, granted Dec. 2, 1882) for an improvement in frilling and crimping machines, describes and claims devices which constitute distinct inventions residing in the same machine. The devices for forming and spacing the frill or crimp, and those for securing the same in place after it is formed, accomplish distinct results, both of which are useful, and either of which would support a patent. The devices also co-operate to make the stitched plait. The sewing mechanism is essential only for making the complete or stitched plait.

The claims of the patent cover all the devices in combination, and also the sub-combinations, which are operative only in forming and spacing the frills or plaits.

The first claim covers the crimping devices with and without the stitching mechanism. It is limited, however, by its terms to a combination in which the blade or crimper acts to space the crimps as well as to form them. The defendant's crimper does not act to space the crimps, and they do not therefore infringe this claim.

The second claim is as follows: "In combination, a crimper and a smoother substantially such as described, and acting substantially as specified, to fold the crimps to an edge." The crimper described in the specification is a blade actuated by a cam and spring, and its mode of operation is to engage the cloth, advance and make a crimp of the cloth lying between it and the holder, and shove the cloth along under the holder; it then retreats for another advance. While it moves forward to crimp it acts as a crimper. After the crimp is formed it acts as a spacer to space the crimps apart, and as a pusher to force the goods through the machine. The space between the crimps depends upon the length of advance of the crimper after the crimp is formed, which is determined and made adjustable by other mechanism. The crimper which is included in this claim is one which is to operate in combination with the other necessary co-operative parts substantially in the manner thus pointed out. It may operate effectively to fold the crimp to an edge without spacing them regularly, and in this regard may be an improvement upon the Singer or Arnold or Magic Ruffle contrivance. In describing their invention the patentees state that the invention "consists essentially of two parts, the one for forming the crimps and the other for securing them in place after they are formed," and they then proceed to say that "the mechanism for forming the crimps consists of a crimper which both forms and spaces them." The specification plainly describes how the parts can operate to fold the crimps to an edge without spacing them. The language of the claim is apt and precise to cover such a combination, and clearly distinguishes the functions of the operative parts from those assigned to the parts in the first claim.

While the defendants' machines do not employ a crimper which

operates independently to space the crimps their crimper and smoother effect the operation of folding the crimps to an edge, and their devices in this behalf are the substantial equivalents of those in the combination described in the second claim. In their machines the spacing is done by revolving rolls or holder which, after each crimp is formed, advances the cloth while the blade is retreating through a distance equal to the space between the successive crimps.

The second claim and the fourth claim of the patent are infringed. The fifth claim is not infringed, as the defendants have no auxiliary smoother such as is described in the patent.

The decree is ordered for the complainant, adjudging infringement of the second and fourth claims of the patent.

[ENDORSED:] Circuit Court of the United States, for the Southern District of New York.—Tuttle, Trustee, &c., *v.* Claflin and others.—OPINION. WALLACE, J.—U. S. Circuit Court.—Filed Mar. 10, 1884. Timothy Griffith, Clerk.

At a Stated Term of the Circuit Court of the United States, held in and for the Second Circuit and Southern District of New York, at the Court Rooms in the City of New York, on the day of March, A. D. 1884.

Present—HON. WILLIAM J. WALLACE, Circuit Judge.

THEODORE A. TUTTLE, Trustee, etc.,
AGAINST
HORACE B. CLAFLIN, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE and DANIEL ROBINSON.

This cause came on to be heard at this February Term of this Court, upon pleadings and proofs, and was argued by counsel for both parties, and the Court having held the same under advisement:

Now, upon due consideration, and being of the opinion that Chauncey O. Crosby and Henry Kellogg were the joint, original and first inventors of what is described and claimed in the letters patent upon which this suit is brought, being Letters Patent of the United States, granted to C. O. Crosby and Henry Kellogg, No. 37,033, bearing date December 2d, 1862, for improvements in machines for frilling and crimping, and the Court being of the opinion that the defendants have infringed the said letters patent, it is, therefore,

Ordered, adjudged and decreed, letters patent are good and valid in law, and that the complainant is the owner of the same, as trustee in insolvency of the Elm City Company: that the defendants have infringed said letters patent, and upon the exclusive rights of the complainant under the same, in the use of machines containing the improvements described in the said letters patent, and set forth in the second and fourth claims thereof, to wit.: Machines having "a crimper and a smoother in combination substantially such as described, and acting substantially as specified, to fold the crimps to an edge;" also, machines having "a crimper substantially as specified in com-

bination with a spring acting to force said crimper upon the goods while crimping them, and relaxing its pressure while the crimper is retracting, substantially in the manner and for the purpose specified" in said letters patent, and it is further

Ordered, adjudged and decreed, that the complainnt do have and recover of the defendants the profits, gains and advantages which the said defendants, or either of them, have derived or received, or to which they may be entitled by reason of the said, or of any infringement of said patent: and that the said complainant do recover of the said defendants all damages which the Elm City Company, or the complainant, as its trustee, or either of them, has sustained, by reason of any infringements of said patent by the said defendants. And the solicitors for the parties so requesting this cause is hereby referred to Timothy Griffith, as Master *pro hac vice*, to take and state an account of said profits, gains and advantages, and to ascertain and assess all damages sustained as aforesaid, and to report thereon, with all convenient speed, and, upon the coming in and confirmation of the said report, that the said complainant have a decree and execution for the amount so found, and also for the costs in this suit to be taxed.

The reason for the appointment of the Clerk of this Court, as Master *pro hac vice*, is that the exhibits in this cause are on file in his office, and they are valuable and heavy and expensive to move.

W. J. WALLACE.

U. S. Circuit Court, Southern District of New York. In Equity.

THEODORE A. TUTTLE, Trustee in Insolvency of the Elm City Company,

AGAINST

JOHN CLAFLIN, as Executor of the Last Will and Testament of Horace B. Claflin, deceased, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE and DANIEL ROBINSON.

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

I, GEORGE F. BETTS, the Special Master appointed in and by the interlocutory decree in the above-entitled cause, to take and state an account of the profits, gains and advantages which the defendants or either of them have derived or received, or to which they may be entitled by reason of any infringement of the patent in said decree mentioned, and to assess all damages sustained by the Elm City Company or the complainant as its trustee, or either of them, by reason of any infringement of said patent by the said defendants, do report as follows:

I have been attended by the respective parties and their counsel, and have heard and taken the proofs and allegations presented to me on their behalf, as they appear hereto appended, and I do find therefrom, as matter of fact, that during the years 1873, 1874, 1875, 1876, 1877, 1878 and 1879 the defendants had in use in their business at various times four roller pleating machines, some of which were known as the Griffith and the others as the Fanning machines,

which were very similar to each other, and all of which infringed the second and fourth claims of the complainant's patent.

I further find as matter of fact that the device described in said patent, and claimed in its second claim, of the use of a reciprocating knife or folding blade which folds the goods over itself and up to a holder or smoother, thereby producing pleats with clearly defined edges and a well defined piece of pleated goods in regular successive pleats, was fundamentally new and was a pioneer invention in the art of pleating goods.

I further find as matter of fact that there has not been at any time whatever up to the present time any method or device, except hand labor, known or used other than that described in said patent and claimed in its second claim, whereby goods could be pleated or folded to a clearly defined edge so that the product should be a well defined piece of pleated goods in regular successive pleats.

I further find as matter of fact that the invention described in the Crosby and Kellogg Patent and claimed in its second claim is the essential feature of both the Griffith and Fanning machines, without which they would have been worthless, and that each of the said machines embodied the form in which the defendants clothed the said invention and did not contain any new devices that required invention or more than average mechanical ability to introduce.

I further find as matter of fact that during the period of their said infringement of said patent, the defendants have pleated four hundred and eighty-three thousand nine hundred and ten (483,910) yards of goods, which would have cost (if other than woolen) fifteen cents per yard to pleat by hand, making a total of $72,586.50, and that 60,489 yards of the above-mentioned goods were woolen goods, which would have cost ten cents more per yard to pleat by hand, making 86,048.90 additional, and making an aggregate total cost of $78,635.40; and that the cost of pleating said goods by the device described in said patent, and claimed in its second and fourth claims, and used by said defendants, was a half cent per yard, making the total cost of pleating said 483,910 yards by that method to have been $2,419.55, and therefore making the total saving that resulted from using said method upon the above-mentioned goods instead of hand pleating to be $76,215.85.

I further find that no sufficient proof was introduced before me as to any quantity of goods having been pleated by the defendants in the year 1873.

I further find, as a matter of fact, that there was not any established license fee under the Crosby and Kellogg Patent.

I do not assess any damages against the defendants for their infringement of the said patent.

I do therefore report the sum of seventy-six thousand two hundred and fifteen $\frac{85}{100}$ dollars as the profits, gains and advantages which the said defendants have derived, received or become entitled to by reason of their infringement of the patent in said decree referred to.

All of which is respectfully submitted.

August 24, 1893.

GEO. F. BETTS,
Special Master.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee,
AGAINST
JOHN CLAFLIN, as Executor, etc., *et al.*

EXCEPTIONS made and filed on behalf of the defendants to the report of the Master herein, filed the 26th day of August, 1893:

FIRST.—The defendants except to the finding of the Master that the Fanning machines used by the defendants infringed the fourth claim of the letters patent in suit, such finding being outside the scope of the inquiry before the Master, and there being no evidence before the master to sustain such finding, and further except to said finding in that the Master did not find that the Fanning machines did not infringe the said fourth claim.

SECOND.—The defendants except to the finding of the Master in the following words:

"I further find, as matter of fact, that the device described in said patent, and claimed in said second claim, of the use of a reciprocating knife, or folding blade, which folds the goods over itself and up to a holder or smoother, thereby producing pleats with clearly defined edges and a well defined piece of pleated goods in regular successive pleats was fundamentally new and was a pioneer invention in the art of pleating goods," on the ground, first, that the Court not having found the said invention to be a pioneer invention in the art of pleating goods, the issue, whether it was a pioneer invention or not, was not included in the reference to the Master; and, second, that the finding that the same was a pioneer invention is not supported by the evidence before the Master.

THIRD. The defendants further except to the Master's said finding, last-above quoted, in that the Master did not find in accordance with the opinion of the Court and the evidence that the invention of the complainant's said patent was for an improvement in frilling and crimping machines, and that the claims infringed relate only to certain subcombinations of the devices described in the patent, which subcombinations relate to the operation of forming crimps, and not of spacing them, or securing them after they are formed.

FOURTH. The defendants except to the finding of the Master, as follows:

"I further find as a matter of fact that there has not been, at any time whatever up to the present time, any method or device except hand labor known or used other than that described in said patent and claimed in its second claim, whereby goods could be pleated or folded to a clearly defined edge so that the product should be a well-defined piece of pleated goods in regular successive pleats,"

on the ground that the same is not supported by the evidence before the Master, and that there is no evidence that the mechanism included in the second claim of said patent was of itself and alone capable of folding goods to a clearly defined edge so that the prod-

uct should be a well-defined piece of pleated goods in regular successive pleats.

FIFTH. The defendants further except to the finding of the Master last-above quoted on the ground that there was known and used during the period covered by this accounting a method whereby goods could be pleated or folded to a clearly defined edge so that the product should be a well defined piece of pleated goods in regular successive pleats by the use of the ordinary mechanism of the sewing machine.

SIXTH. The defendants further except to the said last-mentioned finding of the Master on the ground that the method of pleating by the use of the sewing machine could be done at the rate of a yard in about five minutes by a skilled operator at wages of about five dollars per week or at the rate of from three-quarters of a cent to a cent and a half per yard.

SEVENTH. The defendants further except to the said last-mentioned finding of the Master in that he did not find that pleated trimming could have been made upon a sewing machine at the said cost of from three-quarters of a cent to a cent and a half, for mercantile purposes, and were so made at the defendants' establishment within the period covered by the accounting.

EIGHTH. The defendants further except to the finding of the Master in the following language:

"I further find, as a matter of fact, that the invention described in the Crosby & Kellogg Patent and claimed in its second claim, is the essential feature of both the Griffith and the Fanning machines, without which they would have been worthless, and that each of the said machines embodied the form in which the defendants clothed the said invention, and did not contain any new devices that required invention or more than average mechanical ability to introduce,"

in that the same is without sufficient evidence to support it, and is against the evidence.

NINTH. The defendants further except to the finding of the Master in that he did not find that the said roller-plaiting machines used by the defendants contained in addition to any invention set forth in the patent in suit, the inventions of George B. Arnold, of Samuel Orr, of John H. Pipo and other inventions and mechanical contrivances, all of which entered into and contributed to any profits derived from the excellence of the work, or saving of labor produced by the use of the machines used by the defendants.

TENTH. The defendants except to the finding of the Master in the following words:

"I further find as a matter of fact that during the period of their said infringement of said patent, the defendants have pleated four hundred and eighty-three thousand nine hundred and ten (483,910) yards of goods, which would have cost (if other than woolen) fifteen cents per yard to pleat by hand, making a total of $72,586.50, and that 60,489 yards of the above-mentioned goods were woolen goods, which would have cost ten cents more per yard to pleat by hand, making $6,048.90 additional, and making an aggregate total cost of $78,635.40."

On the ground that the same is not supported by the evidence, and that there is no proof that the number of yards found by the Master was pleated upon the infringing machines, and by the use of the second and fourth claims of the patent in suit.

ELEVENTH. The defendants except to the finding of the Master, "that the cost of pleating said goods by the device described in said patent and claimed in its second and fourth claims and used by said defendants, was a half a cent per yard, making the total cost of pleating said 483,910 yards by that method to have been $2,419.55, and, therefore, making the total saving that resulted from using said method upon the above-mentioned goods instead of hand pleating to be $76,215.85,"
on the ground that there is no proof that any method of hand pleating costing fifteen cents per yard to pleat for goods other than woolen, or twenty-five cents per yard for woolen goods, was ever used in the art by manufacturers of pleated goods for making pleated goods, like the pleated goods made on the machines used by the defendants.

TWELFTH. The defendants further except to the last-mentioned finding of the Master, on the ground that there was no facts proved before him sufficient to establish a reasonable presumption that if the defendants had not used the pleating machines, which they did employ, they would have used a method of hand pleating costing fifteen and twenty-five cents per yard.

THIRTEENTH. The defendants further except to the last-mentioned finding of the Master, on the ground that any method of hand pleating, costing fifteen and twenty-five cents a yard was impracticable and unavailable during the period covered by the accounting as a means of pleating goods to be used in the manufacture of ladies' suits, in lieu of the machines used by the defendants.

FOURTEENTH. The defendants further except to the last-mentioned finding of the Master, on the ground that the amount of $76,215.85, found by the Master as profits made by saving in the use of said machines, is not the amount of any profits which the defendants actually did receive by the use of the said machines, the said profits so received, if any, being derived from the sale of the pleatings made on said machines, as part of the ladies' suits to which they were affixed as trimmings, but a speculative and conjectural amount, not based upon any actual saving, and far in excess of the actual value to the defendants of the use of said machines.

FIFTEENTH. The defendants except to the above last-mentioned finding of the Master as unsupported by the evidence and against evidence.

SIXTEENTH. The defendants except to the finding of the Master that it would have cost fifteen and twenty-five cents to pleat the goods pleated by the defendants on the Griffith and Fanning machines, and in that he did not find that the said goods might have been pleated for fifty cents per hundred yards, and that the defendants could have procured the said goods to have been pleated for them for that price, and did procure goods to be pleated for them at that price.

SEVENTEENTH. The defendants further except to the Master's

finding that the defendants saved $76,215.85 by the use of the Grffith and Fanning machines, as unsupported by the evidence and against the evidence adduced before the Master.

EIGHTEENTH. The defendants further except to the Master's finding that the defendants made profits, gains and advantages by the use of the said Griffith and Fanning machines to the amount of $76,215.85, and in that he did not find that there was no evidence introduced before him sufficient to show the amount of profits, if any, received by the defendants because of the presence in the Griffith and Fanning machines used by them, of the inventions covered by the second or fourth claims, one or both, of the said letters patent in suit.

NINETEENTH. The defendants except to the finding of the Master that there was not any established license fee under the Crosby & Kellogg Patent, and in that he did not find that the owners of the Crosby & Kellogg Patent licensed any person who desired to use the same, and was willing to pay the license fee charged.

TWENTIETH. The defendants except to the finding and report of the Master of the sum of seventy-six thousand two hundred and fifteen $\frac{85}{100}$ dollars as the profits, gains and advantages which the defendants derived, received or became entitled to by reason of their infringement of the patent in the decree herein referred to.

CHARLES W. GOULD,
Defendants' Solicitor,
2 Wall Street,
N. Y. City.

EDMUND WETMORE,
Counsel for Defendants,
45 William Street,
N. Y. City.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, as Trustee of Elm City Company,
vs.
HORACE B. CLAFLIN and others
} In Equity.

Proceedings before JOSEPH GUTMAN, JR., Master under the decretal order herein.

NEW YORK, April 11, 1889, 10 A. M.

Present—GEORGE H. WOOSTER, ESQ., representiug the complainant.

No one appearing on the part of the defendants, the hearing is adjourned to Monday, April 15, 1889, at 11 A. M.

JOSEPH GUTMAN, JR.,
Master.

NEW YORK, April 15, 1889, 11 A. M.

Present—W. T. B. MILLIKEN, ESQ., counsel for complainant, and R. W. G. WELLING, ESQ., on the part of the defendants.

It is consented by the respective parties that the evidence, both documentary and parol, and all the models and exhibits taken and

used herein before the former Master, Timothy Griffith, Esq., and the testimony taken for final hearing herein be taken and used herein before the present Master with the same force and effect as if taken originally before him, and that the record of the proceedings as taken by him be used as the record herein.

Complainant's solicitor produces a notice, and proof of service thereof on the solicitor for the defendants, requiring the production before the Master, at 11 A. M., this day, at his office of Ashabel K. Smith, a witness whose examination was pending at the last hearing before the former Master herein.

The said notice is marked "Complainant's Exhibit Notice."

Mr. Welling, on behalf of the defendants, asks for an adjournment on the ground that Mr. Wetmore, counsel for the defendants, is unable to attend to-day, by reason of other urgent engagements.

Mr. Milliken, on the part of the complainant, opposes any adjournment.

The Master adjourns the hearing to Monday, April 22, 1889, at 11 A. M., to enable Mr. Wetmore to be present, and directs Mr. Welling to have the witness Smith in attendance at the next session on that day.

Adjourned to April 22, 1889, at 11 A. M.

NEW YORK, April 22, 1889, 11 A. M.

Present—MR. MILLIKEN and MR. WOOSTER, on the part of the complainant, and MR. SEXTON, on the part of MR. WETMORE, counsel for the defendants.

Mr. Sexton asks for an adjournment on behalf of Mr. Wetmore, counsel for defendants.

Mr. Milliken, counsel for complainant, opposes any adjournment, and asks for the production of the witness A. K. Smith, whose attendance to-day was directed at the last session.

The record of testimony taken on the accounting herein before TIMOTHY GRIFFITH, Esq., as Master, is taken in evidence herein and marked "Complainant's Exhibit Griffith Record, J. G., Jr., Master, April 22, 1889."

Complainant's Exhibit Record, J. G., Jr., April 22, 1889.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, etc., VERSUS HORACE B. CLAFLIN, *et al.* } In Equity.

Testimony taken on the part of the complainant pursuant to an order of Court filed April 3d, 1884, before TIMOTHY GRIFFITH, Esq., as Master.

NEW YORK, April 10th, 1889.

Present—CHARLES B. STOUGHTON, Esq., of counsel for complainant, and E. WETMORE, Esq., of counsel for defendant.

It is agreed by counsel for both parties that all the evidence taken in this cause for final hearing be considered in evidence before the Master. The decree entered herein on the 3d day of April, 1884, is put in evidence by the complainant. The Master's notice, issued herein on the 8th day of April, 1884, and served on the 9th of April, 1884, on H. B. Claflin, the defendant, is produced, and the complainant desires to go on with the evidence of the witness, who has not appeared.

Defendant's counsel states that he appears on behalf of the defendant for the purpose of receiving instructions as to the form and data to be included in the account to be furnished by defendants as a basis of this accounting. If the Master so directs he will cause to be made up and filed an account showing the number of infringing machines bought, from whom bought, date of purchase, length of time in use and produce for examination in respect to said account any person now in the defendant's firm or employ having personal knowledge thereof whom complainant's counsel may designate, or in case no such designation is made, the person supposed by the defendants to have the most knowledge on the subject; and counsel further states that the person in charge of the department where the machines were used during the period covered by the accounting was the witness Ferguson in the main case, and that if his presence is desired by the complainant a subpœna will be necessary, as he is no longer in the defendant's employ.

Complainant's counsel desires to have the defendant furnish, in addition to the account suggested, all books and vouchers which contain any evidence as to the purchase, use or sale of any infringing machines by them and also any books showing the number of yards used upon such machines or any of them and the cost thereof, and the selling price thereof. Also any books showing the cost of such manufacture, and complainant's counsel requests the Master to direct the defendants to furnish with said books an account taken therefrom showing the purchase or sale of any infringing machines by them, the number of yards of goods used upon such machines, the cost thereof, the number of yards of plaiting or crimping made thereon, the selling price thereof and the cost of manufacture.

The Master directs that the defendants produce a statement in conformity with the offer of the counsel for defendants, on Friday April 11th, 1884, and thereafter such statement as they may be directed to furnish by notice.

Adjourned to Saturday, April 19th, 1884, at 11 A. M.

Circuit Court of the United States, Southern District of New York.

THEODORE A. TUTTLE, Trustee, &c., Complainant,
AGAINST
HORACE B. CLAFLIN, JOHN CLAFLIN, WILLIAM S. DUNN, *et al.*,
Defendants.

The Master directs the defendants in the above entitled cause, to produce before him, on the accounting therein, a statement in writing, showing the number of yards of plaiting or crimping made upon machines like the Griffith and Fanning machine, by the defendants during the period covered by the accounting, or made upon any or all machines alleged to infringe the Crosby and Kellogg patent in suit by them, their servants or agents, between the 2d day of December, 1862, and the 2d day of December, 1879; also to produce before the Master for examination under oath at 11 o'clock A. M., April 19th, the person or persons in the employ of the defendants who are most familiar with the manufacture of plaiting and crimping upon said machines and who are most competent to give the best information with reference to such manufacture and the quantity of plaiting or crimping made upon machines which are the subject of the decree herein, during the periods above mentioned.

NEW YORK, April 19th, 1884,
11 o'clock A. M.

Met pursuant to adjournment.

Present—Counsel as before.

ASABEL K. SMITH, a witness called on the part of complainant, being duly sworn, deposes and says:

Counsel for defendants objects to the Master's order herein for an account served April 14th, 1884, and from producing any account thereunder on the ground that there is no evidence produced by the complainant that the use of the claim alleged to be infringed produces any profit, and consequently that an account of the number of yards plaited on the whole machine is premature.

Overruled; exception.

And defendant's counsel produces the statements called for, and the same are marked "Defendant's Statements No. 1 and No. 2, April 19th, 1884. T. G., Exr."

(The witness states:) My name is Asabel K. Smith; my age is 33; I reside at 22 Second place, Brooklyn, and my occupation is that of clerk in the cloak department of H. B. Claflin & Co. I have been so employed continuously for eight years. I was not in the employ of that firm prior to that time. Five years previous to that I was employed by S. & W. E. Corwin (they were at 194 Church street at that time) as clerk. I obtained the facts to which I have sworn in the report made by me from the books of H. B. Claflin & Co. Aside from the entries in the books, I know of my own knowledge that those machines were in use in the years 1878 and 1879,

and I saw them in use for about three months in the spring of 1878, one month in the fall of 1878, three months in the spring of 1879. They were used in March, April and May, in the spring of both years 1878 and 1879, and in September, 1878. I could not state who operated the machines in those years. There was generally one person at a machine when they were in running order. I remember seeing these machines in use prior to the years 1878 and 1879. We kept no account of the number of yards that we used on the dresses during those years. Sometimes there was one machine in use; sometimes two and sometimes three; but it was very seldom that we had more than two in use in the years 1877, 1878 and 1879. The machine in use in the fall of 1876 was the Fanning machine—sometimes there was one, sometimes two, and sometimes three in use. There were four machines, but we very seldom used the fourth one, as it was only kept there in case of an accident to some of the oshers—to be used when one of the other machines was being repaired. We used the Griffith machine altogether in 1877, 1878 and 1879, and never used the Fanning machine. The entries in books of Claflin & Co. do not show the kind of machine upon which the plaiting was done. There are no papers or books that will show the amount of plaiting done in the years of 1873, 1874, 1875, 1876 and 1877. I was in charge of the department where those machines were in use all the time that I have been there. Mr. William Ferguson was the head of the whole department, but I had charge of the manufacturing department. I could not tell the names of any persons who worked on those machines during the years 1876, 1877, 1878 and 1879. The machines used to be sent out to be repaired. Charles Nylander was the man who did any repairing that was done in the shop during all the time that I have been there, and he is now in their employ. I got the facts contained in my report from the estimate book; every style of garment we make is estimated in a book. The cost is in one book, and the number made in another book. I didn't examine any other books to get these facts. I kept the estimate book during the whole time that I have been there. The entries are not made in my handwriting, but under my direction. I could not state who had charge of my department during the years of 1873, 1874, 1875 and 1876; there were two or three there during that time. I succeeded Mrs. Merril. I don't know where she is now.

The Griffith machines have not been used in my department since the spring of 1879; they have been put away in cases. We have got our plaiting done outside since then.

1 Q. Can you state the name of any person who did plaiting for you prior to December 2d, 1879, and in that year?

A. I cannot. We did not have any plaiting done outside by any one while we were using these machines. The plaiting that we sent out to be done was the same kind of plaiting that we used to do on the Griffith machines before we stopped using them. We paid fifty cents for one hundred yards. We sent out the goods and they were returned to us plaited, and we paid fifty cents per hundred yards. It was one hundred yards of goods; the goods were cut into strips

and then sent out to be plaited. It was fifty cents for a hundred yards of goods as they were sent out, before they were plaited. We first sent out goods to be plaited, after we stopped using the machines, the next season—I think it was in the fall of 1879; think the goods will show when it was. The styles of goods upon which this plaiting was placed during the years 1876, 1877, 1878 and 1879 were linens, lawns, silks and dress goods, and the style of garments was ladies' suits. The estimate book shows how much plaiting is on each garment, and the number of garments having the plaiting on is shown by the return book, which is also kept under my direction.

Adjourned to Monday, April 23d, 1884, at 2 P. M.

NEW YORK, April 23d, 1884, 11 o'clock A. M.

Met pursuant to adjournment.
Present—Counsel as before.

THE DIRECT EXAMINATION OF MR. SMITH CONTINUED:

2 Q. Have you any means of telling the proportion of plaiting done on the Griffith and Fanning machines at the time you were using the two machines together?

We never used the two machines together; we discontinued the use of the Fanning machine when we first got the Griffith machine.

3 Q. After you purchased the Griffith machines, did you do as much work upon those two in each year as you had previously done on the four Fanning machines?

A. I could not state. I think the largest amount of plaiting we did on those machines was in the spring of 1878. In the spring of that year our business increased to such an extent that we were required to rent two more floors and that is why I judge that our business was larger at that time than at any previous time while we had those machines. I mean the four Fanning and the two Griffith machines.

4 Q. Your statement refers to a time when you were not with Claflin & Co., do you mean to be so understood?

A. Yes, sir.

5 Q. What means have you of knowing of the extent of their business prior to the time when you were with them?

A. I have no means of knowing.

6 Q. Then how are you able to state that the largest amount of plaiting done between 1873 and 1879 was in the spring, 1878?

A. From the mere fact that we required more room.

7 Q. Might not this increase have been for other garments than those on which plaiting was used?

A. We have no books which would show that we made garments but what there would be a likelihood that plaiting was used on them.

8 Q. During what period do you refer to in your last answer?

A. The spring of 1878.

9 Q. What proportion of the suits made by your firm in the spring of 1878 had plaiting on?

A. That I could not say.

10 Q. State as near as you can.

A. I could only guess at it.

11 Q. Can you by an examination of the books ascertain exactly the proportion of the suits made by your firm in the spring of 1878 which had plaiting on ?

A. I think I can.

12 Q. Will you do so ?

A. I will.

13 Q. Can you ascertain the same fact as to the fall of 1876 and the year 1877 ?

A. I think I can.

14 Q. Will you do so ?

A. I will.

The Master directs the witness to produce such statements.

Defendant's counsel objects that the facts called for are immaterial and irrelevant to the subject of this accounting, and imposes an unnecessary expense and delay, and gives notice that he will move that the costs of the accounting be charged against the plaintiff, so far as the expense of making this statement is concerned.

Adjourned to Thursday, April 24th, 1884, at 11 A. M.

NEW YORK, April 24th, 1884, 11 o'clock A. M.

Met pursuant to adjournment.

Present—Counsel as before.

THE DIRECT EXAMINATION OF MR. SMITH CONTINUED :

Counsel for defendants produces the original of statement No. 2, showing 68,190¾ yards during the year 1878, and files the same with the Master, and states that the duplicate thereof, signed and verified before the Master and filed with him was so signed and verified at the hearing, because counsel did not then find the original in his papers, and that by inadvertence it has not been corrected so as to read 68,190¾ instead of 8,190¾ yards was not then noted, and that said correction should be made, the statement being as appears in said first verified paper, and that the error was not discovered until yesterday at the close of the hearing.

15 Q. You have stated that all the books here before the Master were kept under your direction, and yesterday you were unable to explain what the two columns of figures mean on the right-hand side of each page in the manufacturing book of 1879 (marked for identification "A"). How do you explain the difficulty ?

A. That book was ordered to be kept by Mr. Ferguson, but I know that said book was being kept, but was not aware of one column of figures in said book that gave us the exact cost of the labor on each garment in said book.

16 Q. Then that book was not kept under your direction, was it?
A. I can't say that I ordered it to be kept.
17 Q. Was that book kept under your direction or not?
A. No, sir.
18 Q. What book among the seven which you have here and which you have had during your entire examination has been kept under your direction?
A. Five of them.
19 Q. Will you produce them?
A. I will.

The books referred to are marked for identification "B," "C," "D," "E" and "F."

20 Q. How does it happen that those five books were kept under your direction and that the books kept for the same purpose the following year was not?
A. The other book was not kept for the same purpose.
21 Q. What was it kept for?
A. It was kept for the purpose of keeping an account of the number of garments made.
22 Q. What were the books "B," "C," "D," "E" and "F" kept for?
A. To show the cost of the goods.
23 Q. Does not book "A" show the cost of the goods?
A. Yes, sir.
24 Q. Then what do you mean by saying book that "A" was not kept for the same purpose as "B," "C," "D," "E" and "F."
A. Book "A" was kept for the purpose of showing the number of garments made; it also had the cost of the garments in it for the purpose of ascertaining the amount of manufactured goods in dollars and cents.
25 Q. Explain the difference in the purpose for which book "A" was kept and books "B," "C," "D," "E" and "F."
A. I have explained what book "A" was kept for the best that I can. Books "B," "C," "D," "E" and "F" are kept for the purpose of showing the cost of the different materials and articles used on each garment.
26 Q. Where are the books for 1879, showing the cost of the different materials and articles used on each garment?
A. The books are before you on the table. Book "D" is one of them, and book "F" is another.
27 Q. How does it happen that you had charge of this department and all the books except "A"?

Objected to as immaterial. Overruled. Exception.

A. There was a person above me who had charge of the whole department who ordered book "A" kept, and that was Mr. William Ferguson.
28 Q. What kind of books were kept in regard to manufacturing suits and materials used for that purpose, showing the cost, style, etc., in 1876 and 1877?
A. The same kind of a book as B, C, D, E and F.
29 Q. Did you have any conversation with any member of the

firm as to what books you should bring with you, and, if so, were the books of 1876 and 1877 mentioned ?

Objected to as immaterial and incompetent.

Conversation between the witness and his employer is not relevant to any issue here. Overruled. Exception.

A. I had no conversation with any member of our firm as to what books I should bring to this Court.

30 Q. Did you receive any directions as to making up statement No. 2 and testifying in regard to it ; if so, what were those directions, and from whom did you receive them ?

Same objection. Overruled. Exception.

A. I received directions from Mr. John Claflin to make up the account and give it to the Court.

31 Q. What account ?

A. Statement No. 2.

32 Q. State fully what those directions were.

Same objection. Overruled. Exception.

A. That if we had books that we could make up the accounts from to do so ; that was all the instructions that I received.

33 Q. State what those directions were, and what words he used as near as you can ?

Same objection, and also as having been already answered. Overruled. Exception.

A. I have already stated the words he used.

34 Q. (Question repeated.)

Same objection. Overruled. Exception.

A. The Master's order was served on us during our counsel's absence in Boston ; Mr. John Claflin sent for me and told me to make up the account according to the Master's order.

35 Q. If you kept the same kind of book in 1876 and in 1877 as B, C, D, E, and F, how was it possible to make a statement as to the number of yards of plaiting made by your firm in those years ?

A. In 1878 and 1879 we put in those books the number of yards of plaiting that went on each garment made, but did not put on the number of yards of plaiting used on the garments in the years 1874, 1875, 1876 and 1877.

36 Q. How did you determine the cost of the goods in those years ?

A. By putting down in figures about what we thought that the number of yards of plaiting on the garments was worth.

37 Q. What books will show that estimate during the years 1874, 1875, 1876 and 1877 ?

A. The estimate books.

38 Q. Do you think those estimates are correct ?

A. I think they are.

39 Q. Is there an estimate in those books of the cost of the plaiting upon the garments ?

A. There is an estimate of what we thought the plaiting was worth.

40 Q. Do you mean the cost of plaiting the goods?

A. Yes, sir.

41 Q. That is separate, is it not, from the other parts of the garment?

A. Yes, sir.

42 Q. How does the cost of the plaiting in those years compare with the cost in 1878 and 1879?

A. I cannot tell, as the number of yards was not estimated on each garment.

Complainant's counsel requests the Master to direct the defendants to make and furnish an account to be verified showing the cost of plaiting goods upon the Griffith and Fanning machines during the years 1873, 1874, 1875, 1876 and 1877.

Defendant's counsel objects to the granting of the request as immaterial, irrelevant and unnecessary, and further because there is no evidence that material for any such statement exists, the only memoranda in defendant's possession being simple estimates.

The Master directs the defendants to produce a statement of the actual cost or the estimated cost of plaiting used upon garments manufactured by them during the years covered by this accounting prior to 1878.

Same objection to the order as to the request.

Adjourned to Thursday, May 1st, 1884, at 11 A. M.

NEW YORK, May 1st, 1884.

Adjourned to Wednesday, May 7th, 1884, at 11 A. M.

NEW YORK, May 7th, 1884.

Adjourned to Monday, May 12th, 1884, at 11 A. M.

MONDAY, May 12th, 1884.

Met pursuant to adjournment.
Present—Counsel as before.

CONTINUATION OF THE TESTIMONY ASABEL K. SMITH:

Defendant's counsel produces and files with the Master statements called for by the Master's orders of April 23d and 24th, and the same is marked "Defendant's Exhibit Statement No. 3."

We have no books that show that we manufactured any plaiting in 1873.

42*a* Q. Your books show that you had four machines in the spring of 1873. Were they not used by your firm at that time?

A. Yes, sir. There is no way of showing to what extent they were used.

42*b* Q. Isn't there any one in your firm who knows anything about it?

A. I don't think there is any one there that can tell about it.

The Master is requested by complainant's counsel to direct the witness to make the statement conform to the fact.

The statement is corrected as requested.

42*c* Q. Is there, in the possession of the defendants' firm, any estimate book for the year 1873 ?

A. No, sir.

42*d* Q. Plaiting was done that year, was it not, and an estimate book probably kept ?

A. The chances are that there was. We have made searches all through our books, buildings and every place, but can't find any estimate books for 1873. I can't tell the number of suits containing plaiting sold in the year 1873 as compared with suits not containing plaiting.

I herewith produce the books on which statement No. 3 was made up.

The books are marked for identification by the Master from G to M, inclusive ; seven in all.

The said books may be considered by the Master the same as if in evidence.

The books marked from G to M, inclusive, are in the handwriting of different persons ; Mr. Ferguson's and Mr. Young's ; I mean William Ferguson and Robert Young ; the latter was bookkeeper, and still is in defendants' employ.

Adjourned to Thursday, May 15th, 11 A. M.

Adjourned to Monday, May 19th, 1884, at 11 A. M.

NEW YORK, May 19th, 1884, at 11 A. M.

Met pursuant to adjournment.
Present—Counsel as before.
Adjourned to May 20th, 1884, at 11 A. M.

NEW YORK, May 23rd, 1884, at 11 A. M.

Met pursuant to adjournment.
Present—

NEW YORK, June 13, 1885, 11 A. M.

Met pursuant to notice.
Adjourned to Monday, June 15, 1885, at 2 P. M.

NEW YORK, June 15, 1885, 2 P. M.

Met pursuant to adjournment.
Present—Counsel for the respective parties.
Adjourned to Monday, June 22, 1885, at 2 P. M.

NEW YORK, June 22, 1885.

Adjourned to Thursday, June 25, 1885, at 2 P. M.

NEW YORK, June 25, 1885, 2 P. M.

Met pursuant to adjournment.

Present—MR. WETMORE, for defendant, and MR. GEO. H. WOOSTER, for complainant.

EXAMINATION OF THE WITNESS SMITH CONTINUED:

43 Q. You have produced a statement of the number of yards made by the plaiting machines in question during the year 1878 and the spring of 1879. Can you furnish a statement containing the number of yards made by these machines for the years 1873, '4, '5, '6 and '7, or either of them?

A. I cannot.

44 Q. Can you furnish a statement giving an approximate idea of the number of yards made in those years, or either of them?

A. I can, except 1873. That I can give you no information of at all.

45 Q. Please do so.

A. In 1874, the estimate cost of plaiting amounted to $657.86. We usually estimate for doing the plaiting one-half cent per yard. The estimate cost of plaiting for the year 1875 was $490.05; for 1876, $274.24; 1877, $664.90. That is about as near correct as I can get it. This makes a total of $2,067.05, or 413,410 yards for the four years.

46 Q. Have you any idea how the business of 1873 compared with that of 1874, whether it was larger or smaller from what you have gathered from the books?

A. I have not.

47 Q. Could you get any idea from an examination of the books?

A. I cannot find the books for 1873.

48 Q. Did you make or cause to be made certain samples of plating which were used in the final hearing in this case?

Objected to as immaterial. Overruled. Exception.

A. We made samples of plaiting for Mr. Curtis. I don't know what he did with them.

49 Q. Do you mean Mr. Curtis, the expert in this case?

A. Yes, sir.

50 Q. Can you describe those samples, giving the width and the material of which they were made?

Objected to as immaterial. Objection sustained.

51 Q. What proportion of the number of yards of plaiting contained in the statements made were of the width and material like those samples?

Same objection. Objection overruled. Exception.

Further objected to that it does not appear that the witness knows the width or material.

A. I cannot answer it. It would be all guesswork.

52 Q. Can you not give any estimate?

A. I should judge that about one-eighth of the plaiting made on those machines was made of the same material as that used in the samples made for Mr. Curtis. The width I know nothing about. We used all widths from one-half inch up to six inches in all materials used on the machines?

53 Q. Say in 1,000 yards, in what proportion would the widths you have mentioned be divided, taking into consideration all the plaiting that was made on those machines?

A. I cannot answer the question.

54 Q. What was the width used by you mostly in trimming garments such as you have described?

A. About four inches wide.

55 Q. About 75 per cent. four inches wide?

A. I could not give you any idea of the percentage.

56 Q. Do you mean that when those goods were made from one-half to six inches wide that they would average about four inches wide?

A. Yes, sir.

57 Q. What width of plait was used mostly during the years from 1874 to 1879?

A. I am only now speaking for the years 1877 and '8. The width inquired about was one-fourth inch or four plaits to the inch.

I wish to correct my testimony as to the width of material and as to the fabric, by limiting it to the years 1877 and '78, and the spring of 1879, as I have not personal knowledge as to what was done in the previous years.

58 Q. From what you have been able to gather from the books, do you judge that the same state of affairs existed for the previous years?

A. I do.

59 Q. Of what material was the greater portion of this plaiting made?

A. Linen and percales.

60 Q. What proportion of worsted or woolen material?

A. One-eighth; the balance was the other materials.

61 Q. I understand that from the books of H. B. Claflin & Co., the defendants, you gather the information that in the years 1874, '5, '6 and '7, they made on the plaiting machines in question 413,410 yards; in 1878, 68,190 yards, and in the spring of 1879, 2,310 yards, leaving out of the question the year 1873; am I correct?

A. Yes, sir.

ASABEL K. SMITH.

Sworn to before me.

Master.

Adjourned by consent, to Friday, August 14th, 1885, at 1 P. M.

NEW YORK, Friday, August 14, 1885.

Adjourned to September 15th by consent.

September 15th, adjourned, by consent, to Thursday, October 8th, 1885, at 11 A. M.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, &c.,)
VERSUS) In Equity.
HORACE B. CLAFLIN *et al.*)

NEW YORK, February 2, 1888, 11 A. M.

Met pursuant to notice.

Present—GEORGE H. WOOSTER, Esq.

No one else having appeared at the hour of 11 A. M., the Master adjourned the case until Thursday, February 9th, 1888, at 11 A. M.

At 2 P. M. Mr. W. W. NILES appeared on behalf of the complainant, saying that he understood the case was to go on at that hour, but he was informed that the case had been adjourned until Thursday, February 9th, 1888, at 11 A. M.

Adjourned to Thursday, February 9th, 1888, at 11 A. M.

NEW YORK, February 9th, 1888, 11 o'clock A. M.

Met pursuant to adjournment,

Present—W. W. NILES, Esq., and JOHN A. LOGAN, Esq., of counsel for complainant, and Mr. WOOSTER appears as sole representative in this case and objects to the appearance of any one for the complainant without his, Wooster's instruction or authority.

Mr. Wooster further states that he has an agreement, which will be produced at the proper time, signed by Theodore Tuttle, Trustee, &c., and Charles B. Stoughton, giving him, Wooster, sole power and authority to act in the prosecution of this suit, and that he Mr. Wooster, has prosecuted this case so far at his own expense.

Mr. Niles states that A. Nelson Lewis is the absolute owner, by bill of sale and assignment from Theodore A. Tuttle, Trustee, and Charles B. Stoughton, of one-half interest in the patent, and in this particular suit and claim by an agreement, which will now be filed with the Master, and that John A. Logan represents the absolute owner of the remaining half by an agreement with the same parties, which is already, as I am informed, made a record of this Court, and that such owners have retained him, said Niles, and said Logan, and nobody else, to prosecute this case.

Edmund Wetmore, Esq., appears by W. H. Critenden, Esq., as of counsel for defendant, who states that the defendant will respond to the subpœna already served upon him at such time as the Master shall direct, but asks an adjournment on the ground of the absence of Mr. Wetmore, who alone is familiar with the case.

The Master, in view of the above statement of counsel, suggests the production of such assignments or copies thereof as are referred to by counsel, that the same may appear of record for the information of the Court in any event.

Adjourned to Thursday, February 16th, 1888, at 11 A. M.

NEW YORK, February 16th, 1888, 11 A. M.

Met pursuant to adjournment.

Present—Counsel as on February 9th on behalf of complainants, and MR. GEORGE H. WOOSTER, appearing with W. F. B. MILLIKEN, ESQ., as counsel on his behalf. Counsel as before on behalf of the defendant.

Mr. John L. Logan produced by W. D. Davis, of his office, a paper to the following effect with the endorsements thereon. This marked "Exhibit 1, February 18th, 1888, T. G., Master."

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, }
VERSUS } In Equity.
HORACE B. CLAFLIN, *et al.* }

EDMUND WETMORE, ESQ.,
Defendant's Solicitor:

DEAR SIR—John L. Logan, Esq., has been associated with me as counsel in this cause and will have charge of the same. Please serve any papers or notices for the plaintiff at his office, 66 Liberty street, New York City.

Yours,
CHARLES B. STOUGHTON,
Plaintiff's Solicitor.

New York, November 3, 1886.

[ENDORSEMENTS.]

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, &c., }
VERSUS }
HORACE B. CLAFLIN, *et al.* }

SIR—Please take notice that the within is a true copy of a notice of association made in the above-entitled cause and duly filed with the Clerk of the United States Circuit Court for the Southern District of New York on the 29th day of December, 1887.

Dated New York, February 3, 1888.

Yours, etc.,
JOHN L. LOGAN,
Plaintiffs' Solicitor,
66 Liberty St.,
N. Y. City.

To EDMUND WETMORE,
Defendants' Solicitor, 206 Broadway, N. Y.
CHARLES B. STOUGHTON,
Plaintiff's Solicitor:

Due service of a copy of a notice, of which the within is a copy, and a notice of entry thereof is hereby admitted, dated New York, February 3d, 1888.

EDMUND WETMORE,
Defendant's Solicitor.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, &c.,
VERSUS
HORACE B. CLAFLIN *et al.*
} In Equity.

NEW YORK, February 2, 1888, 11 A. M.

Met pursuant to notice.

Present—GEORGE H. WOOSTER, Esq.

No one else having appeared at the hour of 11 A. M., the Master adjourned the case until Thursday, February 9th, 1888, at 11 A. M.

At 2 P. M. Mr. W. W. NILES appeared on behalf of the complainant, saying that he understood the case was to go on at that hour, but he was informed that the case had been adjourned until Thursday, February 9th, 1888, at 11 A. M.

Adjourned to Thursday, February 9th, 1888, at 11 A. M.

NEW YORK, February 9th, 1888, 11 o'clock A. M.

Met pursuant to adjournment,

Present—W. W. NILES, Esq., and JOHN A. LOGAN, Esq., of counsel for complainant, and Mr. WOOSTER appears as sole representative in this case and objects to the appearance of any one for the complainant without his, Wooster's instruction or authority.

Mr. Wooster further states that he has an agreement, which will be produced at the proper time, signed by Theodore Tuttle, Trustee, &c., and Charles B. Stoughton, giving him, Wooster, sole power and authority to act in the prosecution of this suit, and that he Mr. Wooster, has prosecuted this case so far at his own expense.

Mr. Niles states that A. Nelson Lewis is the absolute owner, by bill of sale and assignment from Theodore A. Tuttle, Trustee, and Charles B. Stoughton, of one-half interest in the patent, and in this particular suit and claim by an agreement, which will now be filed with the Master, and that John A. Logan represents the absolute owner of the remaining half by an agreement with the same parties, which is already, as I am informed, made a record of this Court, and that such owners have retained him, said Niles, and said Logan, and nobody else, to prosecute this case.

Edmund Wetmore, Esq., appears by W. H. Critenden, Esq., as of counsel for defendant, who states that the defendant will respond to the subpœna already served upon him at such time as the Master shall direct, but asks an adjournment on the ground of the absence of Mr. Wetmore, who alone is familiar with the case.

The Master, in view of the above statement of counsel, suggests the production of such assignments or copies thereof as are referred to by counsel, that the same may appear of record for the information of the Court in any event.

Adjourned to Thursday, February 16th, 1888, at 11 A. M.

NEW YORK, February 16th, 1888, 11 A. M.

Met pursuant to adjournment.

Present—Counsel as on February 9th on behalf of complainants, and MR. GEORGE H. WOOSTER, appearing with W. F. B. MILLIKEN, ESQ., as counsel on his behalf. Counsel as before on behalf of the defendant.

Mr. John L. Logan produced by W. D. Davis, of his office, a paper to the following effect with the endorsements thereon. This marked "Exhibit 1, February 18th, 1888, T. G., Master."

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, }
VERSUS } In Equity.
HORACE B. CLAFLIN, *et al.* }

EDMUND WETMORE, ESQ.,
Defendant's Solicitor:

DEAR SIR—John L. Logan, Esq., has been associated with me as counsel in this cause and will have charge of the same. Please serve any papers or notices for the plaintiff at his office, 66 Liberty street, New York City.

Yours,
CHARLES B. STOUGHTON,
Plaintiff's Solicitor.

New York, November 3, 1886.

[ENDORSEMENTS.]

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, &c., }
VERSUS }
HORACE B. CLAFLIN, *et al.* }

SIR—Please take notice that the within is a true copy of a notice of association made in the above-entitled cause and duly filed with the Clerk of the United States Circuit Court for the Southern District of New York on the 29th day of December, 1887.

Dated New York, February 3, 1888.

Yours, etc.,
JOHN L. LOGAN,
Plaintiffs' Solicitor,
66 Liberty St.,
N. Y. City.

To EDMUND WETMORE,
Defendants' Solicitor, 206 Broadway, N. Y.
CHARLES B. STOUGHTON,
Plaintiff's Solicitor:

Due service of a copy of a notice, of which the within is a copy, and a notice of entry thereof is hereby admitted, dated New York, February 3d, 1888.

EDMUND WETMORE,
Defendant's Solicitor.

Mr. Wooster here renewed his objection of February 9th, 1888, to the appearance of Mr. Logan, or any counsel, for the reasons then stated, and produced a copy paper to the following effect, which is marked "Exhibit No. 2, February 10th, 1888, T. G., Master."

WHEREAS, Letters Patent of the United States were granted to Crosby & Kellogg, and by them assigned to the Elm City Co., dated the second day of December, 1862, No. 37,033, and the same are now owned and controlled by Theodore A. Tuttle, Trustee of the Elm City Co., and Charles B. Stoughton, Attorney, &c.; and

WHEREAS, certain other Letters Patent were granted to John A. Pipo on the 29th day of July, 1875, to Geo. H. Wooster, No. 6,565, and are now owned by the said Wooster, and

WHEREAS, suits have been brought against H. B. Claflin & Co., of the City of New York, under said Patents for infringement of the same; and

WHEREAS, the said Tuttle and the said Wooster consider that it is for the mutual benefit of each other to unite their interests in the prosecution of the said suits and in the settlement of the same;

NOW, THEREFORE, it is agreed by and between the said Tuttle and the said Wooster that they will each at their own expense push said suits to a final determination, and that the gross proceeds obtained by or under said suits shall be paid over to said Wooster, and shall by him be equally divided; that is to say, one-half to the said Tuttle, Trustee, and one-half to the said Wooster.

It is further agreed by the said Tuttle that the before-mentioned Geo. H. Wooster shall be, and is hereby, empowered to proceed with both of the said suits, if he shall at any time elect so to do at his (Wooster's) own expense. And that the said Wooster shall alone be empowered to settle said suits, or either of them, and that neither of said suits shall be settled by any one else; and said Tuttle, or his attorney, C. B. Stoughton, shall approve, in writing, the terms of any settlement in either case before the same is concluded.

In witness whereof, the parties hereto have hereunto set their hands and seals this 16th day of June, A. D. 1883.

ELM CITY COMPANY,
THEODORE A. TUTTLE, Trustee. [SEAL.]
CHARLES B. STOUGHTON. [SEAL.]
GEO. H. WOOSTER. [SEAL.]

BY THE MASTER: The foregoing paper by Mr. Wooster in support of his objection to the appearance of Mr. Logan or any counsel is received and placed on record for the information of the Court in any event. It presents, as seems to the Master, a question between the complainant in this action and Mr. Wooster. The Master heard at length counsel in argument, and decided that the paper produced by Mr. Wooster presented a question between himself and Mr. Tuttle, the complainant, which involved rights which were not within the province of the Master to consider or decide. The question, as the Master stated, of compliance therewith or failure, might present a cause of action arising under contract for a court of com-

petent jurisdiction to determine; that it seems clear to the Master that it is not one for the Master to interpret. It is, as it seems to him, for the Master to proceed under, and in pursuance of, the interlocutory decree herein, and he confines himself to the terms thereof. The Master stated that it was not for him to decide anything relative to the rights under such a contract between Mr. Wooster and Mr. Tuttle, but to proceed strictly with the accounting as directed by the Court. The record shows that C. B. Stoughton was the solicitor of record in the above-entitled action, and that he appeared as such solicitor to a final hearing, and that the Master is bound to regard him as the solicitor in the appearances before him. The notice here produced (Exhibit No. 1) authorizing another to appear as counsel with him in this cause, namely, John L. Logan, Esq., whom the Master must recognize as appearing by right, it being beyond his province to disregard the solicitor of record. Whatever rights there may be contrary to such appearance is without the scope of the authority of the Master to determine.

John L. Logan, Esq., therefore, as the associate of the solicitor of record, Mr. Stoughton, is hereby recognized.

Now, on motion of Mr. Crittenden, representing Mr. Edmund Wetmore, counsel for defendants, adjourned to February 24th, 1888, at 12 o'clock M.

NEW YORK, February 24th, 1888, 12 M.

Met pursuant to adjournment.

Present—W. W. NILES, ESQ., on behalf of complainant; MR. WOOSTER, on his own behalf, and MR. EDMUND WETMORE, counsel for defendants.

Counsel for defendants objects to proceeding with the accounting on the ground that no notice to do so has been served by Mr. Stoughton, the solicitor for the complainant.

BY THE MASTER: The Master having recognized Mr. Logan at a previous meeting under the notice given to him by Mr. Stoughton, the complainant herein not having appeared in person or interposed any objection, the Master adheres to his ruling of the day before, and the objection of Mr. Wetmore is therefore overruled.

The Master directs that Mr. Tuttle be notified to be present at the next meeting, and the Master directs that counsel for the various parties serve notice upon Mr. Tuttle to appear before him on Friday, March 2d, 1888, at 12 M.

Adjourned to Friday, March 2d, 1888, at 12 M.

NEW YORK, March 2d, 1888, 12 M.

Met pursuant to adjournment.

Present—MR. MILLIKEN appears for the complainant as solicitor and as counsel, having been substituted as such solicitor by order of this Court, entered and dated February 29th, 1888, a certified copy of which has been heretofore served upon the Master, and MR. WETMORE appears for the defendant.

Adjourned by consent of parties to March 16th, 1888, at 11 A. M.

Hearing adjourned to April 23d, 1889, at 12 M.

JOSEPH GUTMAN, JR.,
Master.

NEW YORK, April 23d, 1889, 12 M.

Present—MR. MILLIKEN, counsel for the complainant, and MR. WETMORE, counsel for defendants, and the witness ASABEL K. SMITH, who was heretofore sworn and examined by Mr. Griffith, as Master herein.

ASABEL K. SMITH, being by me duly cautioned and sworn, and being examined by Mr. Milliken, counsel for complainant, deposes and says :

62 Q. Do you recollect at what time in the spring of 1879 you ceased using the machines in question ?

A. I do not, the exact date.

63 Q. Do you recollect about the time that an injunction was made against using the machines ?

A. I do not.

64 Q. Do you recollect about what month it was you ceased using the machines ?

A. March, 1879, as near as I can remember.

65 Q. How long after you ceased using the machine did you continue to send out the work to be plaited ?

Objected to as irrelevant and immaterial, and beyond the scope of the order of accounting. Objection overruled. Exception.

A. We continued during the balance of the year 1879 at times.

66 Q. To whom was the work sent ?

A. I do not know. I do not remember.

67 Q. Do your books show to whom it was sent ?

A. Yes, sir.

68 Q. Will you look at your books and tell us ?

A. I will, sir.

69 Q. Did you see the goods when they were returned from the manufactory ?

A. I did, sir. I could not tell by the appearance of the goods when they were returned whether they were plaited by hand or by machinery. I do not know by what method they were plaited.

Adjourned to April 26th, 1889, at 4 P. M.

NEW YORK, April 26, 1889, 4 P. M.

Hearing further adjourned by consent to April 27th, 1889, at 11 A. M.

JOSEPH GUTMAN, JR.,
Master.

NEW YORK, April 27th, 1889, 11 A. M.

Present—MR. WOOSTER on the part of the complainant, and MR. WETMORE, counsel for defendant.

FREDERICK A. KURSHEEDT, a witness of lawful age, produced on the part of the complainant, having been by me first duly sworn, and being examined by Mr. Wooster, deposes and says:

1 Q. What is your name, age, residence and occupation?

A. My name is Frederick A. Kursheedt; I am 43 years old; I reside at New York City; I am president of the Kursheedt Manufacturing Co., manufacturers of trimmings, etc.

2 Q. Have you or your company made a business of manufacturing plaitings? If so, for how long a time?

A. I have been engaged manufacturing plaitings with different parties since 1862.

3 Q. Are the Kursheedt Manufacturing Co. now engaged in the manufacture of plaitings and plaited goods?

A. Yes.

4 Q. As a manufacturer of such goods do you fully understand the difference in the labor and cost of labor between goods manufactured by machines like the Crosby & Kellogg machine patented in December, 1862, and goods of the same kind made by hand.

Objected to as immaterial and irrelevant.

1. Because there is no proof in the case that the defendant used the Crosby & Kellogg machine.

2. Because there is no proof that there was no other way to make plaitings except by hand unless by the employment of a machine containing the second and fourth claims of the patent in suit.

Objection sustained. Exception.

5 Q. Were you licensees under the Crosby & Kellogg Patent for frilling and crimping dated December 2, 1862, No. 37,033.

A. We were licensees—the Kursheedt Mf. Co.—were licensees under the Crosby & Kellogg Patent 37,033?

6 Q. Are you acquainted with the state of the art of manufactured plaitings and plaited goods before the date of that patent?

A. I have some acquaintance with the state of the art.

7 Q. Previous to the Crosby & Kellogg patent was there any mechanism known which would plait a strip of goods four inches wide, making a plait or fold a quarter of an inch in width, and capable of folding said strips to an edge?

Objected to—1st as incompetent, the witness not being shown qualified to answer; 2d, as immaterial and irrelevant, there being no proof that the patent in suit involves plaited strips of any special width.

Objection sustained. Exception.

8 Q. As a manufacturer of such goods, do you fully understand the difference in the labor and cost of labor between goods manufactured by machines like the Kellogg & Crosby of patent of December 2, 1862, and goods of the same kind made by hand?

Same objection as to Q. 4.

Objection sustained. Exception.

9 Q. Are you familiar with the various kinds of machines for making plaitings, and can you state the difference in the cost of labor between goods manufactured by the device of a blade or knife reciprocating on a plate for the purpose of making plaits and goods made by hand ?

Objected to 1st, as to the form of the question, and, 2d, as immaterial and irrelevant, because the question is not limited to machines which the defendants might have used, and were open to the trade to use ; 3d, that no foundation has been made for making a comparison between the cost of making the plaiting on the machine of the patent in suit and the cost of making the plaiting by hand ; 4th, as indefinite. Objection sustained. Exception.

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10 Q. Was there any machine previous to the Crosby & Kellogg machine of December 2, 1862, that would form regular plaits on strips of goods passing through it ?

Objected to as the witness is not proved qualified to answer that question. Objection sustained. Exception.

11 Q. In protecting the concern with which you have been connected from patent suits, etc., have you become familiar with the various devices used for plaiting ?

Objected to because immaterial, the question not being limited either as to time or machines so as to afford any standard for comparison.

Objection overruled. Exception.

A. I have.

12 Q. Was there any device, and, if so, what device known to make plaited goods previous to December 2, 1862 ?

Objected to as incompetent, the witness not having been shown qualified. Objection sustained. Exception.

13 Q. You have stated in answer to question 5 that you were a licensee under the Crosby & Kellogg Patent of December 2, 1862, No. 37,033. Before taking such license, did you investigate or cause to be investigated, whether there were any devices in existence previous to that invention like or substantially like it ?

Objected to, first as immaterial, as it is not shown at what time the investigation was made, and next it relates to secondary evidence. Objection overruled. Exception.

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A. I made a very careful examination into the Crosby & Kellogg Patent previous to taking the license granted my corporation.

14 Q. In your examination did you discover anything like, or substantially like, the Crosby & Kellogg Patent referred to ?

Objected to—first, as incompetent, and not calling for the witness' own knowledge ; second, as immaterial. Objection overruled. Exception.

A. No.

15 Q. Did you, or did you not, find that the Crosby & Kellogg Patent No. 37,033 was the first device known for making plaitings or plaited goods ?

Objected to, there being no proof of the witness' personal knowledge and what he may have learned from others, being incompetent and immaterial. Objection overruled. Exception.

A. I did not find any device that would make plaited goods, such as the Crosby & Kellogg Patent would make, and I find that the Crosby & Kellogg Patent would make all kinds of plaited goods, such as were in demand at the time.

Last part of answer objected to as immaterial.

16 Q. Was there any device known before the Crosby & Kellogg invention for making plaitings and plaited goods?

Objected to as incompetent, the witness not having been qualified. Objection sustained. Exception.

17 Q. Do you know whether or not there was any machine like, or substantially like, the Crosby & Kellogg machine prior to December 2, 1862?

Question withdrawn.

18 Q. Do you know what there was in existence for making plated goods before the Crosby & Kellogg machine in question prior to December 2, 1862?

A. Yes.

19 Q. Was there anything in existence like, or substantially like, the Kellogg device for making plaited goods?

Objected to—first, because it is not shown that the witness is an expert and qualified to answer as to the patent in suit, and the question is not limited to the particular devices held to be infringed. Objection sustained. Exception.

20 Q. Do you understand claims No. 2 and 4 of the Crosby & Kellogg Patent, and are you familiar with devices constructed in accordance with those claims, and have you read, and do you understand the specification of said patent?

Objected to on the ground that the witness has not been shown to be an expert or in any way qualified to answer the inquiry, or that he is a person skilled in the machinery to which the patent relates. Objection overruled. Exception.

A. I understand the claims 2 and 4 of said patent and the specication of said patent, and I am familiar with the devices constructed in accordance with such claims.

21 Q. Was there anything in existence prior to the said Crosby & Kellogg Patent, like or substantially like, the device constructed according to said patent?

Objected to, the witness not having been shown qualified to answer. Objection overruled. Exception.

A. No, there was not.

22 Q. As a manufacturer, do you fully understand the difference in the labor and the cost of labor of goods manufactured by such device and goods of the same kind made by hand?

Objected to as incompetent and immaterial. 1st. Because there is no proof that any goods were ever manu-

factured by the devices mentioned in the claims alone, and the patent in suit only describes a small attachment used in connection with a sewing machine which defendants have not used, and because there is no foundation laid for comparison of hand labor with the specific machines used by the defendants in the suit. Objection overruled. Exception.

A. I do.

23 Q. Now take, for instance, a strip of linen percales or alpaca four inches wide, required to be plaited in plaits one-quarter of an inch in width, what would it cost per yard to plait such a strip by hand?

Objected to as not material and incompetent, not being limited to the period of the infringement, and not being shown to be based upon any actual knowledge of the witness at that time, and being purely hypothetical. Objection sustained. Exception.

24 Q. Do you know the value of labor of hands accustomed to doing hand plaiting between the years 1873 and 1880?

A. I do.

25 Q. How does such labor compare to the cost of the same kind of labor at the present time?

A. It would not vary between those periods.

26 Q. What, during the period inquired about, did it cost per yard to plait a strip of linen or percales four inches wide into the plaits a quarter of an inch wide by hand?

A. Seventeen and a half cents a yard.

27 Q. And how much a yard did it cost to plait the same goods by the Crosby Kellogg device referred to?

Objected to on the ground that it appears by the face of the patent that it is impossible to make the said plaiting by the use of any device shown in that patent. There is no evidence in the case that any such plaiting was ever made by the employment of such device except in combination with other devices not included in said patent.

Objection overruled. Exception.

A. A machine constructed embodying the devices as called for in the Crosby & Kellogg patent increased sufficiently in size would plait the goods for half a cent a yard.

28 Q. Can hand made plaitings, by ever so careful and laborious manipulation, be made as merchantable as machine plaitings made by the Crosby & Kellogg device before referred to?

Same objection. Same ruling. Exception.

A. You cannot make plaitings, for the purposes of trade, by hand to be equally valuable as those made by machine.

29 Q. Have you, by request, caused to be made in your factory some samples of machine and hand plaitings such as referred to; if so, please produce them?

Same objection. Same ruling. Exception.

A. I have. I now produce samples of four-inch plaiting made by hand and machine.

They are offered in evidence, and marked "Complainant's Exhibit Hand-made Plaiting" and "Complainant's Exhibit Machine Plaiting."

30 Q. Have the hand-made plaitings which you have produced been made as good as it is possible for such goods to be made by hand?

Objected to as incompetent, the witness not being shown qualified to answer, and as being purely po at best. Objection overruled. Exception.

A. Yes.

31 Q. Will you please explain to the Master what causes the difference in merchantability between these machines and hand-made plaitings using the exhibits which you have produced for that purpose?

Objected to as incompetent and also immaterial, the defendants not having been proved to have used plaiting in any other way than as trimmings to the over-dress goods and not having sold trimmings as articles of merchandise. Objection overruled. Exception.

A. The advantages of the machine-made plaitings over the hand-made plaitings are that the plaits run straight across the goods or at right angles with the hems, the size of the plaits and spaces between the plaits are uniform, while with the hand-made goods the plaits are more or less crooked or out of line, and the plaits and spaces between the plates are irregular and vary in size, thereby presenting an inferior appearance to the machine-made plaiting.

CROSS-EXAMINATION by Mr. Wetmore, Counsel for Defendants:

32 x-Q. When did you pay 17½ cents a yard for plaiting a strip of linen or percale four inches wide into plaits one-quarter of an inch wide by hand?

A. I have not paid that price for plaiting any quantity of those goods by hand, but have fixed the price as being what it would cost to do the work.

33 x-Q. What person, firm or corporation, to your knowledge, has paid during the period referred to in your direct examination 17½ cents a yard for plaiting a strip of linen or percale four inches wide into plaits one-quarter of an inch wide by hand?

A. I have no knowledge as to what other firms or parties have paid for plaiting goods by hand, as described during the period referred to.

34 x-Q. You say you have not paid the price named for plaiting any quantity of the goods by hand. Have you ever paid that price in any instance; to wit, 17½ cents a yard for plaiting a strip of linen or percale four inches wide into plaits one-quarter of an inch wide by hand?

A. I have not plaited goods four inches wide as described by hand, and have not paid that price, and what plaiting I have made of that character by hand have only been as samples.

35 x-Q. What did you pay for the plaiting of the samples?

A. When making samples we take the time of the hands, and we pay them by time and not by quantity.

36 x-Q. In the hand-made plaits of which you have offered a specimen in evidence, is the sewing which secures the plaits in place after they are formed done by hand or machine?

Objected to as immaterial. Objection overruled. Exception.

A. The sewing secures the plaits as they are formed and is done by machine.

37 x-Q. What business were you in prior to December, 1862?

A. I was in the same business making rufflings. I was in the collar and cuff business and ruffling business; also in the law business and the made-up lace business.

38 x-Q. What experience prior to December, 1862, had you had in machinery for making plaitings?

A. I had had no experience in machinery. I operated the knife-plaiting machines for making plaited ruffles about the summer of 1862.

39 x-Q. What sort of knife-plaiting machines? How were they constructed?

A. We had sewing machines with knives fastened to rocker frames and operated by a cam from a shaft of a sewing machine, and which knives acted on the goods which passed beneath them and formed them into ruffles.

40 x-Q. In what respect did these machines which you have last spoken of differ from the mechanism described in the Crosby & Kellogg Patent in suit?

A. They were infringements of the Crosby & Kellogg Patent.

41 x-Q. Had you any experience in plaiting machines before you began to use the machines which you state were infringements of the Crosby & Kellogg Patent in suit?

A. We did not call them plating machines at that period, and their product was not known as plaitings in the trade, but as collarettes and rufflings, and my first experience in making rufflings was about May or June, 1862, as near as I can fix the time.

Adjourned to May 2, 1889, at 10 A. M.

N. Y., May 2d, 1889, 10 A. M.

Present—Mr. Milliken, solicitor for complainant, and the witness, Frederick A. Kursheedt, for cross-examination.

At 10.40 A. M., no one having appeared on behalf of the defendants, the witness signs his deposition, and the further hearing on the accounting is adjourned to Thursday, May 9, 1889, at 10 A. M.

Joseph Gutman, Jr.,
Master.

N. Y., May 9, 1889, 11 A. M.

Hearing further adjourned to May 16, 1889, at 11 A. M.

Joseph Gutman, Jr.,
Master.

N. Y., May 16, 1889, 11 A. M.

Present—MR. MILLIKEN, counsel for complainant, and MR. BROOKS, on the part of Mr. Wetmore, counsel for defendants.

Counsel for defendants asks that the hearing be adjourned ten days.

Mr. Milliken protests against any adjournment, and states that he is ready to proceed.

Adjourned, on account of the absence of Mr. Wetmore, to May 23, 1889, at 11 A. M.

JOSEPH GUTMAN, JR.,
Master.

N. Y., May 23, 1889, 11 A. M.

Present—MR. MILLIKEN, counsel for complainant, and MR. BROOKS, on behalf of Mr. Wetmore, counsel for defendants.

Mr. Brooks, on the part of the defendants, asks for an adjournment for a week on account of the continued absence of Mr. Wetmore at the trial of a suit at Pittsburgh.

Mr. Milliken, who has a witness present for examination, objects to any furthur adjournment.

Adjourned to May 30, 1889, at 11 A. M., upon the understanding that the hearing proceed at that time.

JOSEPH GUTMAN, JR.,
Master.

N. Y., May 30, 1889, 11 A. M.

Further adjourned to June 3, 1889, at 11 A. M.

JOSEPH GUTMAN, JR.,
Master.

N. Y., June 3, 1889, 11 A. M.

Present—MR. MILLIKEN, counsel for complainant, and a representative from MR. WETMORE, counsel for defendant, who presents to the Master a letter from Mr. Wetmore (which is hereto annexed), asking for an adjournment.

Law Offices
of
Wetmore & Jenner.

Edmund Wetmore.
Wm. A. Jenner.

NEW YORK, June 3, 1889,
45 William and 43 Pine Streets.

MR. JOS. GUTMAN:

DEAR SIR—I did not learn until now that the adjournment in Tuttle *v.* Claflin was set for this morning. I had previously set a meeting for this morning, for counsel who have come many hundred miles are here, and cannot remain, and to-morrow

and Wednesday I have engagements in the Circuit Court. If you will let the hearing stand till Thursday, if that day is open, I will attend then. I did not know that any day had been fixed by you for proceeding since Thursday or I should have sent word before.

Yours Truly,

EDMUND WETMORE.

Mr. Milliken states that he notified the firm of Wetmore & Jenner, by notice by mail, sent on the 29th day of May, of the session for to-day, and states that he now appears with his witnesses, to-day, ready to proceed and opposes any adjournment.

Mr. Wetmore's representative states that his engagement in court will prevent Mr. Wetmore's attendance before the Master, and asks for an adjoarnment until next Monday.

Adjourned to Monday, June 10, 1889, at 11 A. M., hearing to proceed at that time.

JOSEPH GUTMAN, JR.,
Master.

N. Y., June 10, 1889, 11 A. M.

Present—MR. MILLIKEN, counsel for complainant, and MR. WETMORE, counsel for defendants.

HENRY S. BROWN, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy herein, and being examined by Mr. Milliken, deposes and says:

1 Q. Where do you reside, Mr. Brown?

A. 209 East One Hundred and Twenty-sixth street; I am a manufacturer of rufflings, flutings and plaitings; my place of business is No. 92 White street, N. Y.

2 Q. How long have you been engaged in the manufacture of plaitings?

A. Since 1860.

3 Q. Were you actively engaged in that business from 1873 to 1880?

A. I was.

4 Q. Were you then acquainted with the cost of manufacturing plaitings?

A. I was.

5 Q. Was there any difference in the cost of manufacturing linen and woolen goods?

A. There was.

6 Q. Which was the more costly?

A. Woolen goods.

7 Q. Do you know what the cost of manufacturing linen pleating, four pleats to the inch and four inches wide was—linen or percale goods?

Objected to as immaterial and irrelevant. Objection overruled. Exception.

A. Well at that time it was almost impossible to get girls to pleat those narrow pleats in any kind of a perfect manner to be salable, and they cost me from fifteen to twenty cents a yard.

That part of the answer stating what it cost the witness himself objected to, and motion made to strike it out by defendant's counsel. Motion denied. Exception.

8 Q. Could it be done for any less than that by hand?

A. I didn't think that it could at that time. I put my forelady on it, and she was pretty experienced in all kinds of sewing-machine work, and she did the best she could.

9 Q. How much more would it cost to pleat the same in woolen?

A. Not less than ten cents a yard.

10 Q. Then it would be from twenty-five to thirty cents a yard?

A. Yes, it would. Every pleat after being laid would have to be pressed out with a hot iron to make it stay flat.

AND BEING CROSS-EXAMINED BY MR. WETMORE, SAYS:

11 x-Q. Have you been continuously engaged in the manufacture of rufflings and pleatings since 1860?

A. With the exception of about two years—1868 and 1869.

12 x-Q. How were you then engaged?

A. I was running a feed mill at the time.

13 x-Q. During that time that you were in the ruffling and pleating business from 1860, were you in business on your own account?

A. I was employed by the Magic Ruffle Co. until 1862; after that on my own account.

14 x-Q. The Magic Ruffle Co. owned the Arnold Patents for pleating machines, did they not, and made and sold goods under them?

A. I believe they did.

15 x-Q. Do you remember ever testifying on behalf of the complainant on any suits brought under those patents?

A. I remember of testifying in a suit for Mr. Wooster. I have testified for the company owning the Arnold Patents on behalf of the patent.

16 x-Q. And you have testified a number of times, have you not, at the request of Mr. Wooster, on various suits on pleating machines?

Objected to as incompetent and irrelevant. Objection overruled. Exception.

A. I have.

17 x-Q. Have you had any partner in the ruffling or pleating business, or have you carried on business independently?

Objected to as irrelevant and immaterial. Objection overruled. Exception.

A. I have had a partner.

18 x-Q. And whom, and what was your firm name?

Same objection as last. Objection overruled. Exception.

A. At what time?

19 x-Q. At any time from 1860 downwards while you were connected with the pleating business. State what the successive firms were.

Same objection and ruling. Exception.

A. I did business in my own name—that is, contracted the Magic Ruffle Company's business from them—from about 1862 to about 1868. I then went into the milling business until about 1870. In 1871 I was agent for my wife in partnership with a man by the name of Marston in the ruffling and pleating business. After that I carried on business for myself in this same line until 1879. I then went into partnership with a man of the name of Julius Schroeder for a little over a year—about a year and a half. Since then I have been in business for myself alone.

20 x-Q. Did you begin to manufacture pleatings prior to the year 1862 ?

A. At that time it was called ruffling. I did not manufacture pleating, as you term it. I was then working for the Magic Ruffle Company, and I was experimenting on machines for pleating, but not manufacturing pleatings.

21 x-Q. What did you mean by your answer to the second question, which question and answer are as follows : " 2 Q. How long have you been engaged in the manufacture of plaitings ? A. Since 1860."

A. Previous to 1862 I was manufacturing for the Magic Ruffle Co., and we used to term it plaitings and rufflings. Sometimes I could make the machines make very fine plaits, at others it would gather or ruffle.

22 x-Q. How long prior to 1862 did you carry on that manufacture ?

A. Since 1860.

23 x-Q. When, during the years between 1873 and 1880, did it cost you from 15 to 20 cents a yard to manufacture linen plaitings, four plaits to the inch and four inches wide ?

A. I think it was about 1876 or 1878.

24 x-Q. Did you receive the goods of others and plait them, or did you sell the goods already plaited—I am referring now to the linen plaitings ?

A. What I did of them I sold directly for myself. I did not receive goods to plait for others. They were mostly of organdie, which was easier to plait and stay in.

25 x-Q. Did you make and sell anything beside organdie pleatings of the kind referred to ?

A. Some lawns with lace on the edge.

26 x-Q. Anything else ?

A. Not of those widths. I did in other widths and other kinds of goods.

27 x-Q. Did you sell any linen pleatings or pleatings of percale, four pleats to the inch and four inches wide ?

A. Not of percale ; very little linen ; mostly organdie and lawn, as they were easier to pleat and cheaper and more desirable in my trade.

28 x-Q. How much did you get a yard for the linen pleatings referred to in the last question?

A. I couldn't tell.

29 x-Q. Can you state whether you got more than 15 or 20 cents?

A. I could not have sold it for 20 cents. It came too expensive to make it up in that way. I had to get a machine to pleat up those goods afterwards.

30 x-Q. And is the same true of the price 15 cents for those goods? Did you sell any at as high a price as that?

A. I couldn't tell what I got for the goods. They came too expensive. I had to plait them by machinery.

31 x-Q. Then when you say that those goods cost you from 15 to 20 cents, do you mean that you experimented to find out how much it would cost at that time to plait them by hand and you ascertained that it would cost so much that it was impossible to employ that method of plaiting where such linen or percale goods were to be used by manufacturers?

A. After experimenting and having my girls try to plait them up, I found it would cost me too much, and I would have to use a machine for doing the work.

32 x-Q. Did you ever plait any woolens by hand, which, you say, would cost from 25 to 30 cents a yard?

A. I tried it, and found it would cost too much, and I couldn't do it. Plaitings for bottoms of dresses.

33 x-Q. You never sold or attempted to sell any woolen plaitings which had been plaited by hand, did you?

A. I don't think I did.

RE-DIRECT BY MR. MILLIKEN:

34 Re-d. Q. Was the Arnold Machine a ruffling or a plaiting machine?

A. It was considered a ruffling machine.

35 Re-d. Q. What is your distinction between a ruffling and a plaiting?

A. The ruffling machine makes uneven gathers or ruffles, and the plaiting machine makes distinct plaits of a uniform size.

36 Re-d. Q. Did you use the Crosby & Kellogg machine after your experiments by hand had failed?

A. The machine wasn't known by that name. Whether it came under their patent or not I don't know. I don't think it was known under any particular name. I had it built for me to do this kind of work.

37 Re-d. Q. Was it a machine in which a blade or knife worked on a plate?

A. The blade or knife worked on a roller which took the place of a plate.

38 Re-d. Q. When were you experimenting for the purpose of determining the cost of plaiting by hand, did you make the test upon linen and percale and organdie and woolen goods?

A. On woolen goods, linen, organdie and lawns.

39 Re-d. Q. Was the test made upon various widths of material?

A. Yes, and upon different sized plaits to the inch, the fine plaits costing a great deal more than the larger ones.

40 Re-d. Q. Were your tests sufficient to give you an accurate knowledge of the cost of making plaitings of four plaits to the inch and four inches wide, in the various materials mentioned?

A. They were.

41 Re-d. Q. As the result of those experiments, did you find that it would be impossible to compete with pleatings manufactured by machine, in both quality and cost?

A. On woolen goods I couldn't do them at all in those narrow pleats so as to give any satisfaction, and on other kinds of goods it cost too much to enable me to sell them.

42 Re-d. Q. In the other materials could the work be done as nicely and satisfactory by hand as by machine?

A. It could not.

FURTHER CROSS-EXAMINATION BY MR. WETMORE:

43 Re-x-Q. Who made the pleating machines which you used?

A. A man by the name of Brown—J. H. Brown—who, at that time, had his shop at Second avenue and Twenty-second street.

44 Re-x-Q. Did you to the owners of the Arnold Patent pay a license fee or royalty for the right to use that machine?

Objected to as immaterial and irrelevant.

Objection overruled. Exception.

A. The Arnold Company were my relation, and I was told by my uncle—one of the company—that I could go on and use any of these kinds of machines as much as I wanted. That is all the license or royalty that I had.

45 Re-x-Q. You have testified, have you not, in former cases that the plaiting machines like those which you used were made in accordance with the Arnold Patent?

A. I have, so far as I know, their claims.

46 Re-x-Q. Did Mr. Brown make all the plaiting machines you used?

A. No.

47 Re-x-Q. Who else furnished you?

A. There are different kinds of plaiting machines. Some stitch the plaits down when they are formed, and others press them down between hot rollers. I only had one that plaited on a roller and pressed the goods down; and that Mr. Brown made. I had two others that sewed the plaits down, and I don't know who made them.

H. S. BROWN.

Subscribed and sworn to before me.

JOSEPH GUTMAN, JR.,
Master.

Adjourned to June 13, 1889, at 11 A. M.

NEW YORK, June 13, 1889, 11 A. M.

Present—MR. MILLIKEN, counsel for complainant.

GEORGE H. WOOSTER, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn, and being examined by Mr. Milliken, deposes and says, as follows:

1 Q. What is your name, age, residence and occupation?

A. My name is George H. Wooster; I am 59 years of age; I reside at West New Brighton, Staten Island, New York; I am at present engaged in no business.

2 Q. Were you ever engaged in the business of manufacturing pleatings and rufflings?

A. I was connected with such business from about the year 1862 to 1880.

3 Q. Are you familiar with all branches of the manufacturing part of that business?

A. I am.

4 Q. Did you have personal knowledge of the details of the manufacture?

A. I did.

5 Q. Have you the knowledge derived from your own personal observation and experience in the business of the various materials and designs and sizes of the pleatings?

A. I have.

6 Q. Of what materials —what were the usual materials of pleatings from 1872 to 1880?

A. Silks, linens, lawns, percales, alpacas, woolen stuff of various kinds.

7 Q. The sizes as to widths?

A. The sizes of pleats varied from one-sixteenth of an inch to three-fourths of an inch in the width of pleat, and the strips of goods varied in width from three-fourths of an inch to nine inches.

8 Q. You speak of the width of the pleat. You refer to a measure which determines the number of pleats to an inch. Is that so?

A. Yes. One sixteenth of an inch pleat would be sixteen to the inch; one-fourth of an inch pleat would be four to the inch.

9 Q. Are you familiar with the cost of manufacturing such plaits by machinery?

A. I was, and have had large experience in that line.

10 Q. Were you by knowledge derived from your experience in the business qualified to state the cost of manufacturing the same plaitings by hand?

A. I think I am.

11 Q. What would be the cost of manufacturing percale and linen plaitings four inches wide and four plaits to the inch by hand?

A. To manufacture such materials by hand with the degree of nicety required by the market would be very expensive. They could not be manufactured at any cost to compete in quality with the same kind of plaitings made by machine. Each plait would have to be measured and laid into a fold; that fold would have to

be pressed down with a hot iron as soon as made. All these goods during these years were hemmed on each edge with a double hem which was difficult to plait and press by hand, but, in order to make a plaiting which would approach in any degree the machine-made plaiting in perfection of the width of material, and width of plait required of, would cost at least 20 cents a yard in linen and percales, in my opinion?

12 Q. In which one of the materials could the work be done most easily and nicely?

A. The linens and percales are both stubborn goods, and are about equal.

13 Q. I mean in which one of all the materials you have mentioned?

A. Lawn would be the easiest. Silk would be easy to plait, but to plait silk by hand it would be likely to be spotted and ruined by perspiring hands in using the hot iron. Woolen materials would be the most difficult and most expensive to manufacture.

14 Q. Have you had any experience in litigations in respect to devices for plaitings?

A. I have.

15 Q. To what extent generally?

A. I was sued under the patent in question about the year 1869, fought the thing two or three years and was defeated. I owned two or three devices for making plaitings which were subject to this patent, which devices were infringed by various manufacturers, and for a number of years previous to 1883 I was engaged in prosecuting such infringers in the courts.

16 Q. From 1873 to 1880, did you have occasion to make special investigations in respect to the art of constructing plaiting devices in your business?

A. I did.

17 Q. By reason of these various investigations and experiences and observations, did you become familiar with this art?

A. I did.

18 Q. From the knowledge so acquired or acquired in any other way can you state what its condition was as to pleating devices? If so, tell us what it was?

A. I think I can. There was no device that I knew of for making pleated goods that was free to be used during those years, and the only way that I knew of that goods could be pleated outside of a patented device was by hand. The Crosby & Kellogg Patent involved in this suit was the controlling or bottom patent. There were various improvements, so-called, such as a flexible blade instead of a rigid blade, but all infringements, so decided by the Courts, of the Crosby & Kellogg Patent of December 2, 1862. The Arnold Patent for making ruffling or gathering bore an earlier date than the patent just referred to.

Mr. Brooks here appears on behalf of Mr. Wetmore and states that Mr. Wetmore is actually engaged in the argument of a cause in court, and asks that the examination be adjourned to enable him to attend.

Adjourned to June 21, 1889, at 11 A. M.

NEW YORK, June 21, 1889, 11 A. M.

Present—MR. MILLIKEN, Counsel for Complainant, and MR. WETMORE, Counsel for Defendant.

EXAMINATION OF THE WITNESS WOOSTER, resumed :

(Answer to question 18 continued :) But the Arnold Patent was in no respect a pleating device, or capable of making a pleat across the whole width of the material. It was what is known as a gathering device.

CROSS-EXAMINATION by Mr. Wetmore, Counsel for Defendants :

19 x-Q. When did you first have any interest in the Crosby and Kellogg Patent, or the royalties derived therefrom ?

A. I first had a license, I think, about the year 1873 or 1874, but as far as royalties are concerned, I became interested in suits against a few parties first, I think, in about the year 1883. That is, I should not say royalties—I should say recoveries.

20 x-Q. Had you no interest in the recovery which might be had in this suit at the time the bill was filed ?

A. I did not.

21 x-Q. And have you now an interest in that recovery ?

A. I have an agreement which may or may not afford me an interest.

22 x-Q. Is that agreement in evidence in these proceedings, before the Master or otherwise ?

A. Yes, sir.

23 x-Q. The machines held to be infringements in this case have been known, have they not, generally as Roller Pleating Machines ?

A. I believe so.

24 x-Q. When according to your recollection did those machines first come into use ?

A. I think about the year 1868 or 1869, or 1870, the first I knew of them—that particular construction of the knife-pleating device.

25 x-Q. Those machines were made, were they not, in this city by Griffith, Brown and other machinists ?

A. I think so.

26 x-Q. Do you remember the name of any other machinists who at the time of their introduction, or soon after, made those machines ?

A. Yes, Wuterich.

27 x-Q. At the time of the manufacture and introduction of these roller pleating machines, or at any time during their use, had you any interest in the Arnold Patent ?

Objected to as immaterial and irrelevant. Objection overruled. Exception.

A. No, sir.

28 x-Q. Were you interested in any company or partnership at that time that owned or had an interest in the Arnold Patent ?

Same objection and ruling. Exception.

A. No, sir.

29 x-Q. Did you yourself pay, or to your knowledge were royalties paid to the owners of the Arnold Patent for the use of roller-pleating machines substantially like the roller-pleating machine known as the Griffith roller-pleating machine in this suit ?

Objected to as immaterial and irrelevant. Objection withdrawn.

A. The owners of the Arnold Patent commenced suit against us and made application for an injunction, but the motion was denied. That is the last I ever heard of it. Some twenty-five years ago. We paid no royalties and took no license under that patent.

30 x-Q. Were any machines to your knowledge ever constructed by the owners of the Crosby & Kellogg Patent except the ruffling machines constructed by the Elm City Company ?

A. I know nothing of their affairs what they did. When they sued me I know they claimed all out of doors. The real facts I know nothing of.

Defendant's counsel moves to strike out all about what they claimed. Motion granted. Exception.

31 x-Q. You state that you owned two or three devices for making pleatings which were subject to this patent (referring to Crosby & Kellogg Patent), which devices were infringed by various manufacturers, and for a number of years previous to 1883 you were engaged in prosecuting such infringers in the Courts. Were either Griffiths or Wuterich some of those infringers, and did the infringements in any cases consist in making and selling roller-pleating machines like the Griffith machines in suit ?

The Griffith and Wuterich machine I claimed infringed the patent granted to John A. Pipo in July, 1863, said patent claiming a flexible blade instead of a rigid blade, which was used in the patent of Crosby and Kellogg of December, 1862. The Pipo Patent was owned by me.

32 x-Q. Was the Pipo the only patent which you claimed was infringed by those machines ?

A. The box-pleating patent of Walker, November, 1870, consisted of two pleating blades or knives working alternately. I also owned this patent.

GEO. H. WOOSTER.

Subscribed and sworn to before me

JOSEPH GUTMAN, JR.,
Master.

Adjourned to July 1, 1889, at 11 A. M.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, as Trustee of the Elm City Company,
AGAINST
JOHN C. CLAFLIN, as Executor of Horace B. Claflin and others.

Reference continued before GEORGE F. BETTS, Special Master, under order dated 1889, December 23d, 2 P. M.

W. T. B. MILLIKEN, ESQ., for complainant; EDMUND WETMORE, ESQ., for defendants.

The following stipulation is made and assented to by the counsel for the respective parties:

It is consented, stipulated and agreed by the respective parties that the evidence, both documentary and parol, and all the models and exhibits taken and used herein before the former two Masters, Timothy Griffith, Esq., and Joseph Gutman, Jr., Esq., or either of them, and the testimony taken for final hearing herein, be taken and used herein before the present Master with the same force and effect as if taken originally before him, and that the record of the proceedings, as taken by the said Master, Timothy Griffith, Esq., and Joseph Gutman, Jr., Esq., be used as the record herein.

HENRY L. BREVOORT, sworn on behalf of complainant.

I am forty years of age; I reside in Brooklyn, N. Y., and am by occupation an engineer. For the last fifteen or sixteen years I have been almost exclusively engaged in the examination of patent and patented devices and I have, during this period, been very frequently called upon to testify as an expert witness in suits relating to patents and mechanical structures.

I have testified in many hundreds of suits of this character. I am acquainted practically with the art to which this patent relates, having for the last ten years been called upon to testify in a great number of suits brought under patents for devices for forming gathers and plaits. I have myself practically constructed such machinery and have practically operated the same very frequently.

I have previously testified in this case in the final hearing.

1 Q. Have you read the opinion of Hon. Judge WALLACE in the case of Tuttle, trustee, *v.* Claflin, as reported in volume 19, page 599, of the Federal Reporter?

A. I have read the opinion referred to in said Federal Reporter, frequently.

2 Q. Please state, as you understand it, the advance made in the art by Crosby & Kellogg, as set forth in this patent (in suit), No. 37,033, dated December 2d, 1862?

A. The patent of Crosby & Kellogg was a fundamental departure in the art, and was not a disclosure of an invention which consisted merely of an improvement upon some existing art or machine.

The machines that had existed before the Crosby & Kellogg invention had been intended to make what may be called gathers, in a strip of goods passed through the machines. One of these old machines was patented to Singer, and had two roller feeds, one going faster than the other. In this way it was intended that the goods should be gathered in irregular folds, which folds, in their

irregular condition, were to be sewed by the needle. I may say that the Singer machine was unsatisfactory in practice and never was used to any extent in practice. The next machine to which reference need be made is that of Arnold. In this machine two four-motion feeds were employed, the rear one of which moves through a greater distance than the feed in front of it. In this way, as the feed rose above the table and the front of the rear feeding device approached the rear of the front feeding device, a piece of cloth would be nipped in between the two feeds, and as the feeds fell below the table or work-plate this folded piece of cloth was left thereon and was sewed by the needle. This machine of Arnold's was largely used, and it served its purpose of making small crimps or gathers in an effective and satisfactory manner. The folds were small, and an irregularity was not of much importance, and, as a matter of fact, the folds were not very regular, some being folded one way and some another. The machine operated on a principle which involved a special construction of sewing machine, and the operative parts could not be added to a sewing machine without practically a reconstruction of the machine, and, further, its capacity was limited in the direction of the size of the fold that could be made, and though the machine was serviceable for a certain class of goods, its range of utility was limited, and it never was applied practically to the folding or ruffling and the like class of goods for ladies' neckwear, and where much ruffling could be used.

The invention of Crosby & Kellogg now can be intelligently considered, and it will be found, on consideration, that the essence and substance of that invention consists in the use of a knife or folding blade which folds the goods over itself and up to what the patent calls, variously, a holder or smoother. The rest of the mechanism and operation of the machine are in a measure subsidiary to this, which is the dominating principle of the machine, and which form the essential feature or characteristic of the Crosby & Kellogg invention as described in their patent.

Thus, they are the first to set forth in a patent the idea of mechanism of a holder or smoother which held the goods in front of a reciprocating knife or folder which, as it moved forward, would carry the goods forward also into plait form, and acting to fold the goods or the plait to an edge; that is, to define clearly and distinctly the edges of each individual crimp or fold, so that the product was a well-defined piece of folded goods in regular successive similar folds.

In fact I may say that Crosby & Kellogg were the first to ever plait a strip of goods, others had gathered it into more or less regular folds, as in the case of Arnold, but none had ever plaited it as Crosby & Kellogg did with their machine.

The invention, of course, is thus treated in the patent with details of mechanism adapted to make a mechanism for carrying out the principal or essential feature of their invention.

No one before Crosby & Kellogg had ever plaited goods. The Singer machine would not work in practice, and the Arnold machine made a series of puckers or gathers, but not plaits, which

were, however, regular enough for the class of goods manufactured on the Arnold machine.

To sum the matter up, I may say that Crosby & Kellogg were the first to make plaits, and do it by the use of a reciprocating knife, folder or plaiter blade co-operating with a holder or smoother placed in front of the blade.

3 Q. Was there any other device prior to Crosby & Kellogg's Patent by which plaits of a prescribed size and regularity could be made?

Objected to as immaterial and irrelevant. Objection overruled. Exception.

A. There were nothing but hand methods; no organized machines existed for doing plaiting work.

Adjourned to January 2d, 1890, at 2 P. M.

JANUARY 2D, 1890.

HENRY L. BREVOORT—DIRECT EXAMINATION CONTINUED:

4 Q. Please state whether the sewing mechanism described in the patent is or is not an essential feature of the invention disclosed by the patent in suit?

A. The sewing mechanism is not an essential of the mechanism; in fact, the specification itself states as follows: "This machine consists essentially of two parts, or subdivisions, the one for forming the crimps and the other for sewing them in place after they are formed." * * * It will be seen from the above and from a consideration of the machine that the sewing was resorted to not as an essential, but only as one of the means and preferred means of securing the work after the plait had been formed.

The sewing mechanism had nothing whatever to do with the formation of the plaits themselves, but was merely used to secure such plaits after the plaiting mechanism had fully formed the plait.

In very many cases plaits are made and are left temporarily unsecured, the intention being to subsequently secure them upon the article which they are to ornament, and in this case the Crosby and Kellogg plaiting mechanism is serviceable, and has been universally used. The gist of the invention lies in the plait-making mechanism, and not in the plait-securing or fastening mechanism.

5 Q. As to the spacing of the crimps by the knife described in the patent in suit, please state whether this spacing action constitutes any part of the invention of the second claim?

Objected to on the ground of incompetency. Overruled. Exception.

A. The second claim is for a combination consisting of a crimper and a smoother, and, as the smoother must have a co-acting surface on which to do the smoothing, I assume that the claim involves such a surface.

Now, the claim says that these devices are to act to fold the crimps to an edge, and this operation of the mechanism does not involve the spacing of the crimps by the knife. The claim ap-

parently describing the mechanism up to, but not beyond, the step preceding the spacing operation. Thus, I think it is clear that the claim does not involve the spacing action of the blade, and, in fact, the Court has already held machines as within this claim whose blades did not space the crimp.

The second claim appears to be the broad and comprehensive claim which includes the essential features of the apparatus, and without which no organized machine that I know of can produce crimps.

6 Q. Please state whether other and efficient spacing means are referred to in the patent?

A. Yes. The patent describes the use of a rough surface feed below the goods which is an efficient feeding mechanism for the crimps, and which feeding mechanism is now universally combined with the invention of Crosby & Kellogg to feed the goods through the machine.

7 Q. Please state whether, in defendant's machines, spacing devices are present; and, if so, whether they act to space the crimps?

A. The defendant's machines each have spacing mechanism which co-operates with the crimping mechanism and effects the spacing of the crimps by means of two rollers—such spacing mechanism is equivalent to blade feeds or four-motion feeds—but the question of their equivalency is not material, the only point that is material being the fact that the defendant's machines do, by some means, effect the spacing of the crimps, as is described in the Crosby & Kellogg Patent.

8 Q. Is there any function, other than sewing, performed by the machines in the patent which cannot be performed by the infringing machines, constructed in accordance with the second and fourth claims of the patent in suit?

A. No; there is no function, except sewing, that is performed by the Crosby & Kellogg Patent that the defendant's machines cannot perform. The defendant's machines, all of them, contain the essential features which gave value to the invention of Crosby & Kellogg, and thus it is that they can perform the essential operations of the Crosby & Kellogg device. Any machine containing the invention of the second claim, and also invention of the fourth claim, would be a machine with which, necessarily, the manufacture could be carried on, for these claims contain the gist of the entire invention, the other claims being for subsidiary portions of the mechanism.

9 Q. Please state again the particular claims which, as you understand it, mechanically cover or embody the essential advance in the art made by Crosby & Kellogg?

Objected to as immaterial and incompetent. Overruled. Exception.

A. The second and fourth claims are the ones which contain the valuable features of the invention. The first claim is limited in its scope by introducing into the combination there claimed the spacing action of the crimper blade, the third claim is for a crimper having a peculiar end, and the fifth claim is for a detail of mechanism which might or might not be used. The whole of the invention that Crosby & Kellogg made consisted in combining with a crimper

blade a holder or smoother and feeder, so that the crimps could be folded to an edge. This one claim exactly covers their invention, and any one having a license under it would have had all there was in the invention of Crosby & Kellogg. The fourth claim is for the same combination with a spring co-added to force the blade down on the goods as the blade advances, which spring pressure was relieved as the blade retreated. This is an essential with many classes of goods, and therefore next to the second claim this fourth claim describes an invention of great value.

So far as all the claims are concerned, other than the second and fourth, the patent would have possessed as much value without these claims as with them, and with the second claim alone the owners of the Crosby & Kellogg Patent could have obtained and kept the same monopoly that they maintained and had under all the claims, and the reason for this is that this claim contains the entire invention, and without its use not a plait could be made by the Crosby & Kellogg method.

CROSS-EXAMINED BY MR. WETMORE:

10 Q. You have referred and generally described the device set forth in the Arnold Patent of May 8th, 1860, which consists essentially of holding the goods by a forward-holding device while the stock of the goods is taken up by a gathering device so that the goods are taken up faster than they are delivered by the operation of the machine.

Is it not a fact that the Crosby & Kellogg machine of the patent contains the said device of the Arnold Patent?

A. The Crosby & Kellogg machines contain a claim which could rightfully be made in the Arnold Patent on the mechanism there shown, but the Crosby & Kellogg machines did not possess the Arnold mechanism, although they both contained parts which were susceptible of being described by the same broad language.

11 Q. Do not both the defendant's machines contain the said Arnold device, and would it not be impossible to use them for any purpose as plaiting machines if the Arnold device was taken out of them, so that they would not during the period covered by this infringement have required a license under the Arnold Patent?

A. The value of the Crosby & Kellogg invention lay in the fact that the device therein described was not the Arnold device but was a new and different device capable of doing work which the Arnold device could not do. The Arnold Patent, however, contained a claim which was so broad and sweeping that by its terms it could take in machines made like the Crosby & Kellogg machines; that is to say, the reissue did, I think. I do not recollect the claims of the original patent.

12 Q. You were somewhat familiar with the litigation over the Arnold reissued Patent, were you not, and have been engaged as a witness therein, and on one or more occasions heard Hon. Judge BLATCHFORD deliver oral opinions, holding that machines substantially identical with those in this suit fell under said Arnold reissued Patent, and enjoining the use of the same?

Objected to as not the best evidence and incompetent. Overruled. Exception.

A. Yes.

13 Q. Assuming that, as held in this Circuit, Arnold was entitled to the broad claim of the reissued patent, and the same described his actual invention, is not that invention fundamental in all machines since made for either gathering, ruffling or plaiting, and is not the Crosby & Kellogg simply an improvement on the Arnold, which improvement substantially consists in using the identical delivery device of Arnold, to wit: the four-motion feed and the presser foot, and merely changing the gathering device, so as to enable the blade substituted for the gathering feed of Arnold's to make a more regular fold than was customarily made by the use of the Arnold machine.

A. I admit that the reissue contained a collection of words, which words were broad enough in their general significance to embrace all later plaiting mechanisms, but I wholly deny the rest of the statements, and I will do so one by one.

Crosby & Kellogg's device was valuable primarily because it was not the Arnold device, and its whole and entire value lay in this fact. Arnold had two four-motion feeds, which did the entire work of gathering under the presser-foot. Crosby & Kellogg wholly reversed this idea, and did all the gathering outside of the presser-foot, and not under it, and this total reversal of the operation gave to the Crosby & Kellogg invention its great merit, and made its sphere of utility wholly outside of and beyond anything which could have been obtained from the Arnold devices. Arnold never used a crimper, and he never folded a crimp or plait to an edge by making it (viz., the plait) outside of the sphere of the presser-foot, but all that Arnold could do was to make his gather under the presser-foot, as Singer had done before with two-wheel feeds.

Adjourned to the 13th inst., at 12 o'clock.

January 13.

Adjourned to 22d inst., 2 P. M.

January 23.

MR. WOOSTER appeared for the complainant, and MR. WETMORE for the defendant.

14 x-Q. Were you employed as expert for the defendants in several cases brought for infringement of the Arnold Patent, and in which I was defendant's counsel?

A. Yes.

15 x-Q. The machines involved in those suits were plaiting machines, were they not—substantially like the Griffith and Fanning machines involved in this case?

A. They were; that is, the defendant's machines.

16 x-Q. And were you not subsequently present in the court with me when Judge Blatchford from the bench orally overruled our

defence and directed an injunction to issue against the use of said machine ?

A. Yes.

17 x-Q. Under the construction given to the Arnold reissue by Judge Blatchford, as referred to, it would be practically impossible, would it not, to make the said plaiting machine without infringing the said Arnold reissue ?

A. Under the construction given to the Arnold reissue by the Court, the defendant's machines, such as the Fanning and the Griffith machines, were made tributary to the Arnold Reissue, this reissue having been given such a broad interpretation that all existing forms of mechanical plaits came under its broadened claims.

18 x-Q. And under the interpretation thus given by Judge Blatchford to the Arnold Reissue, the Crosby Kellogg invention was an improvement, was it not, upon the invention covered by such reissue ?

A. It was a new mechanism, in contradistinction to being a mere improvement, but it was a mechanism which came under the broad terms of the Arnold Reissue. It was by itself a different machine from the Arnold Reissue.

19 x-Q. Under the construction already referred to of the Arnold Reissue, was it possible to make the Crosby & Kellogg machines without infringing the said reissue ?

A. No.

20 x-Q. Under the said broad construction is it possible to make the particular devices covered by the claims of the Crosby and Kellogg Patent, held to be infringed in this suit, without infringing said Arnold Reissue.

A. No ; such devices would have come under the broad terms of the Arnold Reissue.

21 x-Q. Were you also engaged as an expert in suits brought under the Pipo Reissue, in which the infringement claimed was the use of plaiting machines substantially like the defendant's ?

A. Yes.

22 x-Q. And do you remember the said Pipo Reissue sufficiently to say whether or not the said plaiting machines also fell under the claims of the said Pipo Reissue.

Objected to, as the Pipo Patent was subsequent to the one in question. Objection overruled. Exception.

A. The defendants' machines were held by Judge Blatchford to be infringements of the Pipo Reissue. I believe Judge Blatchford in the Supreme Court has changed his views in this regard. I cannot give the date.

23 x-Q. Do you know whether or not in these Griffith and Fanning machines there are any other inventions patented or unpatented than those already mentioned here ?

A. There may have been patents on details ; indeed, I think Fanning and Griffith both had a patent, but they were so unimportant that their subject matter has escaped my memory.

24 x-Q. Suppose there was no spacing action by the blade in Crosby & Kellogg Patent, could that machine without addition space crimps regularly, by the operation of the four-motion feed ?

A. It could. Every sewing machine to-day which has a plaiter attachment, and such attachments are universal, is spacing its crimps by a four-motion feed, and using the Crosby & Kellogg knife to make the plaits with.

25 x-Q. And that without the addition of anything not shown in the Crosby Patent?

A. Nothing material that was not in the Crosby & Kellogg Patent. There are different devices for transferring the motions, but the parts give substantially the same motions, and the plait is formed by the method first taught by Crosby & Kellogg.

RE-DIRECT EXAMINATION:

26 Re-d. Q. Under the decision of the Supreme Court in the case of Nutter *v.* The Bridgeport Brass Company, is not the Arnold reissue invalid and worthless?

Objected to. Objection sustained. Exception.

27 Re-d. Q. Assuming that the evidence in this case is all that the goods plaited by the defendant upon the infringing machines were from five to six inches wide, and in plaits from one-quarter to three-quarters of an inch wide, could an Arnold machine be made to do a single inch of such work?

Objected to as wholly immaterial. Objection overruled. Exception.

A. No. A machine made in accordance with the Arnold Patent could not make one inch of goods of this class.

28 Re-d. Q. Were not the plaiting devices used in the Pipo Patent substantially shown in the Crosby & Kellogg Patent, and could a device made under the Pipo Patent have been used without permission of the owners of the Crosby & Kellogg Patent?

Objected to (1) as calling for a legal construction of the Pipo Patent; (2) because it already appears that the Court decided that these machines contained the invention covered by the Pipo reissue, and it is wholly immaterial whether Pipo is within or without the Crosby & Kellogg Patent. Objection overruled. Exception.

A. All the parts of the Pipo Patent are found in the Crosby & Kellogg Patent, with the exception of a detail in the action of the spring blade in the Pipo, which is merely a function and not a part The Pipo device, of course, infringed the Crosby & Kellogg Patent, as do all knife plaiters. The Pipo Patent was later in date than the Crosby & Kellogg.

RE-CROSS EXAMINATION:

29 Re-x Q. Do you think you could enlarge the Crosby & Kellogg mechanism without change in other respects, as shown in the patent, so as to plait goods of the size stated in the 27th re-direct question, as to width, plaits, &c., and work the same practically?

A. Yes, undoubtedly.

30 Re-x-Q. Did you ever know it to be done?

A. Not as a Chinese copy; but, in substance, yes. I have seen an ordinary roller machine with a blade so arranged as to space in connection with a movement of the roller, which amounts to the practical Crosby & Kellogg mechanism, the roller being well known as one form of presser foot. The ordinary roller machine, such as the defendants use herein, is practically the Crosby & Kellogg mechanism. I have never seen a Chinese enlargement of the Crosby & Kellogg machine to such a size as is inquired of.

31 Re-x-Q. My question was expressly intended to exclude equivalents, and I understand you to say that you think that a Chinese copy of the machine shown in the Crosby and Kellogg Patent with the identical four-motion feed, and the identical presser foot shown in the patent regularly and successfully made plaits of the size referred to in the said 27th re-direct question, upon material of the same width and doing the spacing by the four-motion feed instead of by the blade, and of course including the sewing mechanism?

A. Such a machine would work. I have never seen one.

HENRY L. BREVOORT.

Sworn to and subscribed before me.

GEO. F. BETTS, Master.

COMPLAINANT RESTS.

Adjourned to 29th inst., 2 P. M.

JANUARY 27th, 1890.

Present—Counsel as before.

Adjourned to February 5th, 1890.

FEBRUARY 5th, 1890.

MR. MILLIKEN for complainant; MR. WETMORE for defendant.

Defendant calls ASABEL K. SMITH:

RE-CALLED:

1 Q. Have you already testified for the plaintiffs in this case?

A. I have.

2 Q. Assume that it would have cost seventeen and a half cents a yard to have plaited goods which the defendants' firm plaited upon these machines, here in controversy, during the period in which said machines were used, would it have been practicable for the defendants during that period to have employed any such method?

Objected to as irrelevant. Overruled. Exception.

A. No.

3 Q. And please answer the same question even assuming that the cost would have varied from fifteen to twenty cents.

Same objection. Objection overruled. Exception.

A. No, sir.

4 Q. Why would the supposed method, at the cost stated, have been impracticable?

A. It would have made the goods cost so much that we could not have sold them.

Mr. Milliken moves to strike out the answer as incompetent, irrelevant, and an opinion of the witness.

Motion denied. Exception.

5 Q. Were these methods known and practiced in the trade, of making the garments upon which the plaiting was used with other material or trimming substituted for the plaiting?

113 Objected to as irrelevant, immaterial and incompetent.

Objection overruled. Exception.

A. There was.

6 Q. What were the plaitings made upon the machine in controversy used for by the defendants?

A. They were used as a trimming upon ladies' dresses.

7 Q. Could the dresses have been made and sold and employed other trimmings?

Objected to as immaterial, irrelevant and conjectural. Objection overruled. Exception.

A. Yes, sir.

8 Q. State, if you please, what other trimmings were employed upon other dresses of the same kind when plaitings were not used?

A. Ruffles were used and box plaitings.

9 Q. What, as a matter of fact, did you do when you ceased using these machines, in respect to making and selling garments which you had formerly trimmed with plaitings?

Objected to as immaterial. Objection overruled. Exception.

A. We designed them without plaiting.

10 Q. Was there any difference in the bulk of your business after the change?

A. No, sir.

CROSS-EXAMINED BY MR. MILLIKEN:

1 x-Q. Mr. Smith, when you testified before, were you subpœnaed to appear before the Master?

A. I cannot remember.

2 x-Q. You came on a Master's order directed to Mr. Claflin to appear, did you not?

A. All I know is that Mr. Claflin sent me here. I don't know on what order.

3 x-Q. Before you made garments trimmed with plaitings made by the machines in question, had you a market for the goods so trimmed?

114 A. I do not know as they were using plaitings when I went with them.

4 x-Q. Do you know whether there had been any goods with

similar plaiting in the market before they were made by the Crosby & Kellogg machines ?

Objected to as immaterial. Objection overruled. Exception.

A. I do not know.

5 x-Q. Do you know whether before you saw the plaitings made by the machines in question, any garments had ever been sold trimmed with similar plaitings ?

A. Yes, sir.

6 x-Q. How long before had you seen them ?

A. About two years, I think.

7 x-Q. Do you know how these plaitings were made ?

Same objection. Overruled. Exception.

A. Yes, sir.

8 x-Q. How were they made ?

A. By placing the goods between two pieces of tin and pressed down flat.

9 x-Q. Was that the first of similar plaited goods that you had seen ?

A. Yes, sir.

10 x-Q. You know nothing then of the market, or price of goods of similar plaiting prior to that time ?

A. No, sir.

11 x-Q. When you state that it would have beeu impracticable to dispose of the plaiting at the price of seventeen and one half cents a yard, you referred to the time when you were with Claflin, did you ?

A. Yes, sir.

12 x-Q, At the time you were there, the market for goods trimmed with the plaitings in question had been established, had it not ?

A. It had.

13 x-Q. You stated that other methods of trimming could have been substituted for plaiting ; how do you know that ?

A. Because I have seen other trimmings used.

14 x-Q. Is that your only answer ?

A. As we used other methods to make out styles after we ceased to use the plaiting machines. That is all.

15 x-Q. During the time that you sold goods trimmed with the plaitings in question, did you not sell goods trimmed as you say these were trimmed, which you say were sold after you ceased trimming goods with the plaits made by the machine in question ?

A. I do not remember.

16 x-Q. Do you mean to say that, while you had your goods trimmed with plaiting made by the machinery in question, so few of the goods trimmed in the other manner were sold that you have no recollection of any of them whatever having been sold ?

A. No, sir ; I don't mean to say that.

17 x-Q. Do you then mean to say that you have no recollection of any such goods having been sold ?

A. I have no recollection.

18 x-Q. During the time that you say that you sold goods trimmed

with the plaitings made by the machines in question, did you sell goods trimmed with ruffles and box plaiting to which you referred in answer to the question of Mr. Wetmore ?

A. I cannot remember.

19 x-Q. According to your best recollection did you commence trimming your goods with such ruffles and box plaitings after you ceased using the plaitings made by the machines in question ?

A. Yes, sir.

20 x-Q. How long did you continue to trim your goods with such ruffles and box plaiting ?

A. I do not remember.

21 x-Q. Do you recollect to what extent as to quantity, I mean in proportion to the quantity you had used of the plaitings in question ?

A. I do not.

22 x-Q. Do you recollect whether the quantity was the one-hundredth part of the preceding quantity ?

A. No, sir.

23 x-Q. Do you recollect anything at all about it ?

A. Yes, sir.

24 x-Q. How much do you recollect ?

A. I recollect of using ruffles, box plaitings, shirring and different styles of trimming, and doing a larger business after we ceased to use the plaitings than we did while using them.

25 x-Q. Now will you describe the ruffle that you used in place of these plaitings ?

A. Different widths of goods cut into strips, hemming on one side and gathered on the other, and sewed on to the garment the same as we used to sew the plaiting on.

26 x-Q. What proportion of all the goods sold with trimmings were trimmed with ruffles ?

A. I do not remember.

27 x-Q. How much of them, do you remember ?

A. I cannot remember.

28 x-Q. Describe the box-plaiting.

A. Goods cut up into strips—different widths—hemmed on one edge, folded or made in folds and sewed on to the garment.

29 x-Q. Do you recollect the quantity of goods sold with those trimmings in proportion to the goods sold with trimmings ?

A. I do not.

30 x-Q. What other trimming do you refer to ?

A. Shirring. That was cut up into strips same as plaiting—different widths—and put through a shirring machine, gathering together as it passed through.

31 x-Q. What other methods of trimming did you refer to?

A. Combination trimmings, or goods of two different colors, put on in folds principally.

32 x-Q. Any other form that you recollect of trimming ?

A. Yes, sir; tucking. We made a number of rows of little folds stitched together and sewed on to the garment.

33 x-Q. Any other kind of trimming?

A. None that I remember.

34 x-Q. Have you any recollection of the proportion of either of those trimmings to the whole? If so, state the proportions of each.

A. I have no recollection.

35 x-Q. Have any recollection of the quantity during the first year after you ceased using the trimming made by the machines in question which you used?

A. No, sir.

36 x-Q. Do you know whether or not any other trimmings which you have described were used simultaneously with the plaitings made by the machines in question?

A. I can't remember. I do not recollect that any were.

Adjourned to 13th inst., 11 A. M., at the office of Mr. Milliken.

FEBRUARY 18th, 1890.

Present—MR. MILLIKEN for complainant, MR. WETMORE for respondent.

Respondent calls JAMES M. HICKS (sworn):

1 Q. What is your age, name, residence and occupation?

A. My age is 55, my residence is Summit, N. J., and occupation civil and mechanical engineer, and expert in patent causes.

2 Q. Please state briefly what experience you have had in studying and practice of applied mechanics, and state especially any experiences you have had in reference to sewing machinery?

A. I graduated at Trinity College, Hartford, Conn., in 1854. I immediately entered upon the practice of my profession as engineer and continued in that capacity for one or two years especially devoting myself to civil engineering. In the year 1856 I went into the employ of the Volcanic Repeating Arms Co., of New Haven, and served as general assistant to my brother, who was superintendent of the company. After the company failed, in 1856, I moved to Boston and went into the employ of the Harrison Loring Steam Engine and Iron Steamship Works. In 1858 I went into the employ of the Ladd & Webster Sewing Machine Co., and worked in the shop for about a year. From that time till about the beginning of the war I assisted my brother, who was the superintendent of that company, in a general way in the mechanical department. About the beginning of the war we proceeded to get up tools for the manufacture of the Spencer rifle, and I remained with that company in the general capacity until the summer of 1862. After that I was for several years with the Novelty Iron Works of New York, and up to the year 1871, after leaving the Novelty Iron Works, I was employed in the manufacture of the Hicks engines. During all these years I was engaged, more or less in practicing before the United States Patent Office, and have continued since 1872 in that practice, and devoting myself especially to examination of patents in relation to their patentability, and in general patent practice, experting more or less during that time.

3 Q. Have you read, and do you understand, the specification of the following patents: Crosby & Kellogg Patent in suit, the Arnold Reissue No. 6159, and the Pipo Reissue No. 6565, Patent Office Copies of which are herewith produced?

A. I have, and I think I understand them.

Mr. Wetmore offers in evidence Patent Office copies of the said Arnold and Pipo Reissue which it is stipulated have the same effect as certified copies, subject to correction by certified copies hereafter if desired. The same are marked "Defendants' Exhibit Arnold Reissue," and "Defendants' Exhibit Pipo Reissue." Mr. Milliken objects to them as irrelevant, immaterial. Objection overruled. Exception.

4 Q. Have you also examined the defendants' machines, held to be infringements in this case, and known as the Griffith and Fanning machines, and do you understand their construction and operation?

A. I have, and I think I do.

5 Q. Please state what the function of the sewing mechanism is in the machine for frilling and crimping, described in the Crosby & Kellogg Patent, and what in your opinion would be the effect of uniting that mechanism in a machine constructed in all other respects like the machine in the Crosby & Kellogg Patent?

A. The sewing mechanism is for the purpose of fastening the frills after they have been formed. If the sewing mechanism was omitted from the machine, necessarily the presser foot, being a part of said mechanism, would be omitted, and that member being absent, no plaiting or frilling could be produced; but should the presser foot be retained as a part of the frilling mechanism, no plaiting could in my opinion be formed that would be retained in its crimps or formation while passing under between the table and the presser foot, urged or fed forward by the secondary operation of the crimping blade. The frictions of the foot and the table upon the folds of the plates would be required to be equal, on the upper and lower portions of the goods, in order that the folds or plaits would not pull out.

6 Q. Is or is not the feeding mechanism of the defendant's machines essential to their operation for the manufacture of plaits?

A. The feeding mechanism in the defendants' machines, the Griffith and Fanning, is to my mind a most essential feature, and perhaps the most important member of the combination.

7 Q. Do those machines employ the feeding mechanism of the Crosby & Kellogg patent, and if not, please describe the feeding mechanism of said Griffith and Fanning machines.

Objected to as immaterial. Objection overruled. Exception.

A. It is not the feeding mechanism of the Crosby & Kellogg Patent. The feeding mechanism of the Griffith and Fanning machines consist of two rollers geared together so that their circumferences travel at the same speed. The cloth having been presented to the feeding rolls, passes between them without any tendency from the surfaces of the rolls to disarrange the position of the plaits.

The upper roll is held upon the lower roll by spring pressure, and this creases or lays the plaits.

8 Q. It is essential for the successful operation of the manufacture of plaits by the defendant's machines that there should be mechanism for spacing the plaits?

A. No additional mechanism for spacing the plaits is required in defendant's machine.

9 Q. It is essential for the successful manufacture that plaits should be spaced in some way?

A. Yes, in order that one plait may not fold under the previous plait.

10 Q. Please describe the mechanism by which the plaits are spaced in the defendant's machines.

A. They are spaced by the feeding rolls feeding the cloth along a greater or less distance by a ratchet mechanism attached to the main driving shaft of the machine in the Griffith, and in a similar manner in the Fanning.

11 Q. Is the spacing mechanism which you have just described equivalent, as is stated by Mr. Brevoort, to the blade feed or four-motion feed, shown in sewing-mechanisms and referred to by Mr. Brevoort in his answer to direct Q. 7?

A. I do not think it is the equivalent. It is an entirely different means of feeding and spacing, and does not perform the same function in the same way, or in an equivalent way. The wheels in the Griffith and Fanning machines, it is true, feed the cloth along, after it has been formed into plaits, without disarranging said plaits, whereas in the Crosby & Kellogg feeding mechanisms, or with the four-motion feed, as proposed by them, the formed plaits could not be fed without disarranging the plaits, unless said plaits were secured by the sewing mechanism or some equivalent means.

12 Q. Is it true that if a machine like the crimping and frilling machine shown in the Crosby and Kellogg Patent were made on an enlarged scale, so that goods could be presented to them as wide as the goods which could be plaited on the defendant's machines, such enlarged Crosby and Kellogg machine, without the needles, but retaining the presser-foot, could do the work which the defendant machines do? Please state your reasons for your opinion.

A. I think it could not be done. If the Crosby and Kellogg machine was enlarged as called for by the question, I don't think that any feeding mechanism capable of feeding the goods along between the necessarily broadened presser-foot and the table could without invention be put into the machine. And I feel very confident that it would be impossible to do it.

13 Q. Please state whether or not the said defendant's machines contain the invention described in the Defendant Exhibit Arnold Reissue, and summed up in the first claim thereof in the following words, viz.: "1. A machine composed of a ruffler and a feeder in "which the ruffler folds the cloth to be ruffled, and brings the fold "up to the feeder, and the feeder holds the cloth, as described, in "advance of the ruffles while the fold is being formed, as substan-"tially in the manner described."

A. I think they do substantially, but not just as described. In the broad interpretation of the claim they do.

14 Q. Have the said defendant's machines any mechanism for increasing or decreasing the throw of the reciprocating blade for the purpose of regulating the size of the plaits?

Objected to as irrelevant and immaterial. Objection overruled. Exception.

A. They have. In the Griffith machine it is done by an adjustable sliding crank-pin, to which the vibrating connecting rod is attached, which connecting rod at the other end is adjustably attached to a crank, said crank being attached to the blade-holder, and sliding backward and forward in a guide—this arrangement is duplicated upon the other side of the machine.

The Fanning machine has its motion limited by an adjustable stop, which the vibrating arms, which carry the attachment to the plaiting blade, strike against on their rearward motion.

15 Q. Does the Crosby and Kellogg machine contain the mechanism which you have just described, and which the defendants' machines contain?

Objected to as immaterial and irrelevant. Objection overruled. Exception.

A. It does not.

16 Q. Is the operation performed by the mechanism, viz., the capacity of thereby adjusting the width of the plaits, essential to the successful commercial operation of the defendants' machines?

A. It is, decidedly.

17 Q. In the operation of the defendants' machines does the forward movement of the blade, in making the plait, terminate invariably at the same point, and is the throw of the said blade for the purpose of determining the width of the plait regulated by increasing or decreasing the extent of its backward or retreating movement?

A. In the Fanning machine, as I now understand it, the forward throw of the plaiting blade comes to substantially a fixed point, while the backward throw for determining the width of the plait is varied by a screw stop, as before described.

In the Griffith machine, with a connecting rod adjusted to a fixed length, the blade moves forward to a fixed point, and the travel of the blade backward to determine the width of the plait is regulated by adjusting the sliding crank pins in the disks on the main shaft.

Adjourned to 21st inst., 11 A. M., to meet at Mr. Wetmore's office.

1890, FEBRUARY 24th.

Present—MR. MILLIKEN, for complainant; MR. WETMORE, for defendants.

Defendants call ALEXANDER E. KURSHEEDT (sworn).

1 Q. What is your age and occupation?

A. Forty-six, and a manufacturer.

2 Q. Are you the manager of the Kursheedt Manufacturing Co. of this city?

A. I am.

3 Q. That company has been engaged for many years, has it not, in the manufacture of rufflings and plaitings, and before the forma-

tion of the company, in 1876, was there a firm engaged in that business of which the firm was a successor?

A. Yes, sir. It was previously Kursheedt & Company.

4 Q. From 1877 and onwards were you acquainted with the dealings of the owners of the Crosby & Kellogg Patent with the plaiting or ruffling trade and those who used roller plaiting machines, with respect to the granting of licenses under the Crosby and Kellogg Patent?

A. Yes, I was, until about the time of the expiration of the Arnold Patent in 1881.

5 Q. During that time did the owner of the patent grant licenses thereunder to any person who desired to use the same, provided he was responsible and willing to pay the license fee charged?

A. Yes.

6 Q. Did you personally negotiate a number of these licenses?

A. Yes.

7 Q. Can you state what was the highest price charged and received and what the range of prices from high to low, for the right to use the Crosby & Kellogg Patent, during the period you mention to firms in this city, of the standing of H. B. Claflin & Co. and doing a similar class of business?

Objected to as immaterial, irrelevant and incompetent. Objection overruled. Exception.

A. There was no fixed license fee, and I recommended the settlements which were accepted for the term, from the date of the settlement to the expiration of the patent, which was, in no instance, to my recollection, over eighteen months. The largest amount was one thousand dollars. I have no distinct recollection of taking less than that amount while the patent was in existence.

Mr. Milliken moves to strike that out as irrelevant and incompetent, and immaterial. Motion denied. Exception.

This settlement was in writing, and the license fee.

Mr. Milliken moves to strike out this evidence as secondary.

8 Q. Were all the licenses that were issued under this patent, during the period you mentioned, printed forms in which the blanks were filled up?

A. No; none of them were.

9 Q. Did any of those documents relate to past damages as well as to future license fees?

A. My best impression is that they all did.

10 Q. Was any other consideration than a sum of money paid when those documents were delivered?

Objected to as secondary evidence. Objection overruled. Exception.

A. I have no recollection of any other at present. It was some time ago.

11 Q. And were the lump sums of money paid at the time of the delivery of those documents the only sums paid thereunder?

Objected to as secondary. Objection overruled. Exception.

A. I negotiated under two different agreements. Under the first, different sums were paid at stated times; some lump sums may have been paid under that. Under the second, the payment was in a lump sum.

Mr. Milliken renews his motion to strike this evidence out as secondary and as calling for the contents of written papers.

Motion sustained, and answer to seventh interrogatory stricken out. Exception.

12 Q. Were you also during any part of the period subsequent to or before 1877 acquainted with the dealings of the Arnold Patent in reference to the ruffling and plaiting trade?

A. I was.

13 Q. As matter of fact, did you negotiate during that time with users of roller plaiting machines to take license under the Arnold Patent?

Objected to as irrelevant and immaterial. Objection overruled. Exception.

A. Not previous to 1877. I commenced in 1877.

14 Q. Did you conduct verbal negotiations with such users to the effect that upon their payment of a sum of money agreed upon between you and them you would cause to be procured for them from the owners of the patent a license which should give them the right to use said patent?

Objected to as immaterial and irrelevant. Objection overruled. Exception.

A. Yes, I did.

15 Q. In respect to the infringers of the Crosby & Kellogg Patent, did you also conduct verbal negotiations with them, the substance of which was that you could, for a sum of money, agreed upon between you, recommend that they receive a license from the owners of the Crosby & Kellogg Patent?

A. These negotiations all resulted either in written agreements or in nothing.

Mr. Milliken objects to any further answer as secondary. Objection sustained. Exception.

Cross-examination reserved until next session, but defendants relieved from producing this witness.

ALEX. E. KURSHEEDT.

Subscribed and sworn to before me.

GEO. F. BETTS,
Special Master.

Defendant calls JAMES M. HICKS (direct continued):

18 Q. Please look at the various claims of the Pipo reissue, and state which one, if any, of those claims you find embodied in the defendants' machines?

A. I have done so, and I mention the first, the third, the seventh, the eighth, the thirteenth.

19 Q. You have already stated certain of the devices and combinations of the Arnold patent which you find in said machines; will

you please, for the sake of clearness, state the claims of the Arnold reissue, which you find in said machines, whether already stated by you or not?

Objected to as immaterial, irrelevant.

Objection overruled. Exception.

A. The first, second, fourth, sixth.

20 Q. Examine defendants' machines here present, and enumerate the principal mechanical inventions and devices, besides the Crosby & Kellogg, and which are essential for the successful operation of said machines, and without regard to whether said inventions and devices are patented or not.

Objected to as incompetent and irrelevant.

Objection overruled. Exception.

A. I will start with the feeding rolls, which, as I said in a previous answer, I consider one of the most essential features of the defendants' machines. The elastic upper roll, the devices above the journals of said upper roll, for increasing the pressure, at will, of the upper roll upon the under. The adjustable ratchet-feeding mechanism by which both of the said rollers are revolved at the same speed with each other. These are substantially common to both defendants' machines. The methods of adjustment for the reciprocation of the gathering blade for the purpose of forming wider or narrower gathers. The mechanism for terminating the forward portion of the gathering blade at a fixed point. 157

The method of reciprocating the gathering blade in the Griffith machine is a positive mechanism in both its forward and its backward motion, and is adjusted by a sliding crank-pin in a disk on the main shaft, as I have before stated. The forward fixed point, to which said blade travels, is regulated by the connecting arms from the sliding crank-pin to the crank attachment to the gathering blade, said connecting rods being provided with screw ends and nuts for the purpose.

In the Fanning machine the forward motion of the gathering blade is regulated by the cam located upon the main driving shaft. The backward motion is regulated by adjustable screw stops. The backward motion being effected by a spring. In the Fanning machine also the pressure of the gathering blade upon the cloth to be gathered in the forward motion of the blade is effected by a spring. In the Griffith machine the pressure upon the cloth to be gathered in the forward motion of the gathering blade is effected positively. In each case the gathering blades being necessarily made thin, and of wrought metal, are elastic, more or less, both in their length and breadth.

In the Fanning machine the pressure of the upper feeding rod upon the under roll is effected by the weight of an arm which presses upon the upper portion of the bearing. In the Griffith machine this pressure is produced by screw pressure.

The only points in either the Griffith or Fanning machines which I find in the Crosby & Kellogg machines are reciprocating blades, and the resistance pieces against which the cloth is gathered, and a mechanism for pressing the blades upon the cloth in the operation of gathering and releasing them in their backward movement. 158

21 Q. Comparing the claims of the Crosby & Kellogg patent to be infringed, and which relate to the devices last mentioned by you, viz., the second and fourth claims of said patent, and the parts of the specification and drawing which relate thereto, what is the relative value and importance of the subject matter of said claims in said defendants' machines, as compared with the value and importance of the Arnold and all other devices, inventions and contrivances contained in said defendants' machines, and essential to their successful and peculiar operation as roller-plaiting machines?

A. It is very difficult for any one to decide which part of what elements in a successful plaiting machine are the most important. It is about as difficult as it would be to decide which was the most important member of a person's body.

The head is, to my mind, the most important. Following that line of thought, I should say that the most important feature of both the defendants' machines consists in the uniform moving, feeding and pressing rolls; for, without these, no proper plaiting could be made, where the sewing mechanism or its equivalent was absent. Another important feature, which is not in the Crosby & Kellogg device, is the adjustability of the forward and backward throw of the gathering blade, which, in the Crosby & Kellogg devices, is varied by the change of cams. The points mentioned I consider the most important features of the defendants' machines. The ability to vary the feed of the cloth between the rolls, independent of the stroke of the reciprocating gathering blade, is another convenient feature, and is not in the Crosby & Kellogg.

The Arnold reissue described and claimed the adjustability of the motions of the gathering blade, as did also the Pipo reissue, and, I should say, while it is a difficult question to solve which is the most important to the defendants' machines, that the features contributed by the Crosby and Kellogg were of minor importance relatively, to those features of the machines which would fall under the claims of the Arnold and Pipo reissues, and far less important than the elements which are peculiar to the Griffith & Fanning machines, and not covered by the Crosby & Kellogg patent.

Adjourned to Friday, the 28th, 10:30 A. M., at the office of Mr. Milliken.

FEBRUARY 28TH, 1890.

Present—MR. MILLIKEN for complainant, MR. WETMORE for defendants.

Defendants call EMILY SMITH (sworn):

I am married and keep house; my maiden name was Emily Simpkins.

1 Q. Were you formerly employed by H. B. Claflin & Co., and if so, in what capacity, and during what years were you in their employ?

A. I was. I had general supervision of the entire work rooms, and designers as well, during part of 1876, during 1877, 1878, 1879 and part of 1880.

2 Q. During that time was the plaiting of that establishment done under your supervision ?

A. Yes, sir.

3 Q. And before that were you in any other establishment in this city where you had similar supervision of the work, including the plaiting ?

A. Yes, sir; I had a similar position at Hayes & Adler.

4 Q. You were familiar with the work that was done on the roller-plaiting machines at Claflin & Co.'s while you were there, and the goods that were plaited on them, were you not ?

A. I was.

5 Q. Did they do similar work and use similar machines at Hayes & Adler ?

A. Yes, sir.

6 Q. Could the goods that were plaited upon the roller-plaiting machines be plaited by hand ?

A. Yes, sir.

7 Q. Do you know what is the cost of doing such plaiting by hand ?

A. I did not know it at that time, because, when it was hand-plaited, it was put in the cost of the garment that the plaiting was to go on.

8 Q. Do you mean that at that time there was no separate charge for plaiting when it was done by hand.

A. No separate price was put on it.

9 Q. Can you tell from your knowledge of what was paid for making the whole garment when the plaiting was made by hand, and the wages of operatives and the other facts connected with the work, what would have been the expense of plaiting by hand during the years you were with H. B. Claflin & Co. the goods that were plaited on the machines, if they had been plaited by hand instead of on the machines ?

Objected to as incompetent because the witness has said she did not know. Objection overruled. Exception.

A. I cannot tell the cost of hand-plaiting at that time for the reason I have given above.

10 Q. How do you get at the cost of plaiting by hand ?

Objected to as incompetent and irrelevant. Objection overruled. Exception.

A. By testing it, trying to see what time it would take to do it.

11 Q. Please state whether you have experimented to ascertain the length of time required to do the plaiting in question by hand, and, if so, please state what has been the result of your experiment ?

A. I did test it on three widths that were mostly used. And I find that the length of time required to do a yard of plaiting such as we use would average ten minutes. One would take nine minutes and another ten.

12 Q. Do you know what were the wages paid the operatives who did that kind of work while you were in the employ of H. B. Claflin & Co.?

Objected to as immaterial and incompetent. Objection overruled. Exception.

A. Yes, sir. Eight dollars per week for a good workman.

13 Q. Knowing the time by experiment as you have stated, can you estimate from that time the cost of hand-plaiting, and, if so, please state how you calculate it to get at the cost?

A. I can. I calculate that if a yard is done in ten minutes, and the working day is nine hours, and the cost of the labor competent to do that is at the rate of five dollars a week.

14 Q. Do you know what labor could have been obtained at while you were with H. B. Claflin & Co. that was competent to do that work if it had been desired to do it by hand?

A. Yes, sir. Five dollars a week.

15 Q. In making your experiment did you sew faster or slower or at about the same rate as an average skilled operative competent to do the work?

A. I think a skilled operator could have done it faster than I did, because I have no practice in that line.

16 Q. Did the operatives who were paid by piece-work for making dresses receive so much for all the sewing that was done on the dresses, and did the sewing include plaiting?

A. Yes, sir.

17 Q. What kind of goods were generally hand-plaited while you were at Claflin & Company's, and before that at Hayes & Adler, during 1876 and after?

A. Silk and dress goods and woolen goods.

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CROSS-EXAMINED BY MR. MILLIKEN:

1 x-Q. When did you commence with Hayes & Adler?

A. I was there in 1876; that is the nearest I can state. I left them latter part of 1876. Went to Claflin & Co., where I remained until 1880.

2 x-Q. Were you familiar at that time with plaiting of the same character with that done on the plaiting machines which was done by hand?

A. What was done by hand was not the same as that done by the machines.

3 x-Q. Then the plaiting done by hand differed from that done on the machine?

A. It did, because one was done by hand and the other on machines.

4 x-Q. Please tell me what the difference was between the work done by hand and the work done on machines?

A. There was no difference in the result on certain kinds of work.

5 x-Q. Did the difference depend upon the material used or upon the dimensions of the plaits?

A. It differed in the material used.

6 x-Q. Where there is a difference between the hand plaiting and the machine plaiting, what is the difference?

A. The materials that were done by hand could be properly done

by hand and could not be properly done on the machine. If done by the machine, it would be glossed and imperfect.

7 x-Q. What kind of goods was that in which that result occurred?

A. Silks and certain kinds of dress goods; dress goods in general could not be plaited on the machines.

8 x-Q. That difference is occasioned by the character of the material, is it not?

A. Yes, sir.

9 x-Q. Was that the only cause of the difference between the result of the work by hand and by the machine?

A. Yes, sir.

10 x-Q. Do you in your answer refer to plaiting identical with that done on machines?

A. Yes, similar—not ruffling.

Adjourned to March 1st, 10.30 A. M., at Mr. Milliken's office.

MARCH 1st.

All present.

CROSS-EXAMINATION CONTINUED:

11 x-Q. When did you make the experiments referred to in your direct testimony?

A. This week.

12 x-Q. Where?

A. At my home in Brooklyn.

13 x-Q. Who was present beside yourself?

A. Nobody.

14 x-Q. How many yards did you make?

A. Two yards of each of three different widths—six yards in all.

15 x-Q. What was the width of the plaits?

A. I cannot give the exact width; I did not measure them.

16 x-Q. Did you measure the width of any of them?

A. No; I did not.

17 x-Q. What was the length of the plaits of any of them?

A. I did not measure that either.

18 x-Q. What was the material?

A. Lawn—all of that one material.

19 x-Q. Was it linen lawn or Victoria lawn?

A. Victoria lawn.

20 x-Q. Was it hemmed?

A. Yes, it was; one on one edge, and the other two pieces on both edges.

21 x-Q. What was the width of the hem?

A. I did not measure that either. It was a wide hem on one side of some and a narrow hem on the other edge.

22 x-Q. Will you tell me, now, the exact process by which you plaited the material hemmed only on one edge?

A. After the material was prepared or hemmed, I plaited it on an ordinary sewing-machine.

23 x-Q. Do you mean that you plaited it on a sewing machine, or sewed it on one?

A. I plaited it on the machine, and the machine sewed it.

24 x-Q. Please tell me how you plaited it?

A. With my two hands and no other instrument than an ordinary sewing-machine. I had no other instrument to straighten the plaits than my fingers.

25 x-Q. Have you brought any of the specimens of your work with you?

A. I have not. I think I have some of them at home. I am willing to deliver them to a messenger if they are there.

26 x-Q. Were your plaits uniform?

A. Yes, they were.

27 x-Q. Did you measure any of them?

A. I did not. I judged they were, from the appearance of the plait.

28 x-Q. Did you fold the plaits to an edge all the way across?

A. I did, from edge to edge, giving them an edge all the way across.

29 x-Q. What did you press them with?

A. My fingers.

30 x-Q. Were you at Claflin & Company's in May, 1879?

A. Yes, sir.

31 x-Q. Did the firm continue to use those machines until you left.

A. No, sir.

32 x-Q. When did they stop?

A. I can't tell. I don't know.

RE-DIRECT EXAMINATION By Mr. Wetmore:

18 Q. Do you wish to correct your testimony given yesterday in any respect as to the time required to do the plaiting which you have described, I have stated that it took ten minutes to do a yard. Is that correct?

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A. I stated yesterday that it was a yard that it required ten minutes to plait. I remembered, on thinking it over afterwards, that it was two yards that were plaited in ten minutes, as each of the pieces were two yards long that I plaited.

19 Q. Without giving the exact measurement, state, as near as you can, or illustrate by a piece of paper, what was the width of the goods you plaited and the size?

Objected to any description of the article which she says she has without producing it.

Objection overruled. Exception.

A. These pieces of paper illustrate it. [Marked "Defendant's Exhibit Sample Hand Plait (1), (2), (3)".] No. 3 is a trifle narrower, I think, than the one I actually plaited.

20 Q. Were these three sizes the ones most frequently made on the machines at Claflin's?

A. Yes, sir.

21 Q. For the finest goods, such as dress goods and silks, was the plaiting done by hand and the sewing machine?

A. It was for all fine goods.

22 Q. You designed the dresses in part?

A. I did.

23 Q. And these plaitings were used as part of the ornamentation in the design of the dress?

A. Yes, sir.

24 Q. Hand-made plaitings are not so precisely uniform as machine-made plaiting. Does that make any difference in their use for ornamentation, and how is it in regard to the hand-made plaiting being sufficiently uniform for use?

A. It makes no difference in appearance, and that is proved by all our best dresses having on the hand-made plaiting and the cheap suits the machine made.

25 Q. Does your general experience and knowledge in business enable you to state, as you have stated, that all the plaiting done on machines at Claflin's might have been done by hand without making any further experiment than you made to test the time with Victoria lawn?

A. Yes, sir.

RE-CROSS EXAMINATION BY MR. MILLIKEN:

33 x-Q. Are you the wife of Mr. A. K. Smith, who has testified in this action, and who is the superintendent of the manufacturing business of the defendants?

A. Yes, sir.

34 x-Q. Look at your paper model (1) and state what was the length of the piece of cloth upon which you made that experiment.

A. Two yards.

35 x-Q. Did you measure it.

A. I did not. I tore a yard-wide goods into two strips.

36 x-Q. Did you measure the work done according to the other models (2) and (3) in the same way?

A. Yes.

37 x-Q. If you did not measure any of it, how did you know it was yard-wide goods?

A. Well, it was yard-wide goods. That is all I know about it. I didn't measure it.

38 x-Q. Tell me just how long you were occupied with No. 1.

A. I can't remember as to that. I can as to the other two.

39 x-Q. Same question as to No. 2?

A. Just exactly ten minutes.

40 x-Q. Not a second above or below?

A. My clock does not indicate seconds. It was just ten minutes by my clock.

41 x-Q. What did you mean when you said it was exactly ten minutes?

A. I just meant what I said.

42 x-Q. Same question as to No. 3?

A. Nine minutes. That came out exactly even as near as my clock and my eyesight could tell.

43 x-Q. When you fastened your plaits as your work progressed, in what part of the length of the plait did you put the stitch?

A. On No. 1 it is about one inch from one edge, leaving what we call a heading; on No. 2 I should judge about half an inch. I did not measure. On No. 3 it was less than a quarter of an inch from the edge.

44 x-Q. Which model represents the piece with only one hem?

A. No. 3.

45 x-Q. At whose suggestion did you make these experiments?

A. At the suggestion of my husband.

46 x-Q. Did he say anything to you about the propriety of bringing the samples or leaving them at home?

A. No, sir.

47 x-Q. To whom have you exhibited those samples since you made them?

A. Only to A. K. Smith.

48 x-Q. Did he take them away from where they were made?

A. No; not to my knowledge.

49 x-Q. Why did you take two strips for each experiment instead of only one?

A. Because that was the way the goods were used in H. B. Claflin's, both on the machine and otherwise.

50 x-Q. Were those strips torn off crosswise from edge to edge of the goods, or lengthwise?

A. Crosswise—across the goods.

51 x-Q. How are goods made on plaiting machines—cut lengthwise or crosswise?

A. Goods at H. B. Claflin's, which is all I can answer for, were cut crosswise.

52 x-Q. How was it at Hayes & Adler's?

A. Crosswise.

53 x-Q. Could you have used the work which you did by hand without sewing the plait as you made it?

A. I certainly could not have used it without sewing for the reason that it would be of no use without sewing.

54 x-Q. Do you recollect the names of the operators on the plaiting machines used by the defendants while you were with the defendants?

A. I do not.

55 x-Q. Do you remember the names of any of the operators employed by the defendants during the time you were there who made plaitings by hand?

A. No, sir.

56 x-Q. Do you remember the names of any of the operators in any of the manufacturing departments of the defendants while you were there?

A. Yes, sir; Nora Meaney, Maggie Farrell, Nora Lyon. That is all I remember at present. If I should sit and think I could think of others.

57 x-Q. Do you remember the names of any of the cutters there?

A. Yes. Joseph Nash, Robert Honor, James Kelly. That is all I remember just now.

58 x-Q. Can you give the present address of any of these?

A. I cannot. I have not been engaged in business since I left Claflin's.

RE-DIRECT EXAMINATION by Mr. Wetmore:

26 Q. Please explain why it is you cannot give the time as to No. 1, and state what you do remember as to the time taken to make that sample, compared with the time taken to make the others?

A. I suppose in making the three I have forgotten the time as to No. 1, and remember as to the others. There was no great difference and it can be done in about the same time. It may vary a minute.

27 Q. When the pleatings were done on the roller-plaiting machines, could they be used without further stitching, and what stitching was done after they left the machine?

A. They could not have been used without further stitching, and our operators were required to do that stitching before they were used. The same stitching had to be put on after they left the machines that I put on these samples.

RE-CROSS-EXAMINATION By Mr. Milliken:

59 x-Q. Do you mean to say that it is necessary on the roller machines to stitch the plaits as they are made in the order that the plaiting may be used?

A. I do. They could not be used without the stitching.

60 x-Q. Before those hand plaits could be used on the garments, was it not necessary that they should be stitched again?

A. No. They were then ready to be used on the garment.

61 x-Q. Whether the hand plaiting did not require a second stitching to put it on the garment?

A. Yes, sir. And the stitching I referred to above on the machine-made plaits could be done when the plait was sewed on the garment, if the operators were skillful enough, which they seldom were.

62 x-Q. Do you, or do you not, know that the trade is supplied with plaitings manufactured upon plaiting machines which are put upon the market without any stitching in them whatever?

A. I do not know of any such in the market. I never saw any plaitings offered for sale that were not stitched on one edge.

EMILIE SMITH.

Subscribed and sworn to before me

GEORGE F. BETTS,
Special Master.

CHARLES BERGENSTEIN, sworn:

I was in business in the City of New York as a member of the firm of Charles Bergenstein & Co. in 1878 in manufacturing rufflings and lace goods. We used plating machines, ruffling machines, side-plaiting machines, known as roller-plaiting machines.

1 Q. Did you take a license under the Crosby & Kellogg Patent?

Objected to as immaterial. Objection overruled. Exception.

A. As much as I see of it here; I did take one out.

2 Q. Did you execute this instrument now shown to you, or was it delivered to you on behalf of your firm?

A. It was delivered to me on behalf of my firm.

3 Q. Did you receive it from Alexander E. Kursheedt?

A. I did.

Instrument offered. Plaintiff admits the signatures are genuine.

Objected to as immaterial. Objection overruled. Exception.

Marked "Bergenstein, License Deft.'s Ex."

4 Q. Did you pay Mr. Kursheedt the sum of money upon the receipt of the paper mentioned therein?

A. Yes, sir.

CROSS-EXAMINED by Mr. Milliken:

1 x-Q. Were you engaged in business September 19th, 1877, and if so, where?

A. Yes; at 325 Canal street.

2 x-Q. What was your business?

A. Manufacture of rufflings and lace goods.

3 x-Q. What was the firm name?

A. Charles Bergenstein & Co.

4 x-Q. What portion of the building did you occupy?

A. All the lofts above the store—three.

5 x-Q. How long did you continue to use the machines described in this license?

A. Ever since that time, off and on.

CHAS. BERGENSTEIN.

Subscribed and sworn to before me,

GEO. F. BETTS,
Special Master.

Adjourned to March 4th, 11 A. M., at the office of Mr. Milliken.

1890. March 4th.

Present—MR. MILLIKEN for complainant; MR. WETMORE for defendants.

Defendants called HENRY SIDENBERG (sworn):

I am 45 years old; reside at 14 West Fifty-first street, in the City of New York; am a manufacturer of ladies' neckwear at 47 to 51 Mercer street.

1 Q. Please state if you have been in business in the City of New York since 1870?

A. I have.

2 Q. Please state the name of your firm, if any, and in what business engaged during that time?

A. Our firm now, and at that time was, G. Sidenberg & Co., engaged in manufacturing ladies' neckwear.

3 Q. Did your firm during said period use roller-plaiting machines in their business?

A. To my recollection we did since 1872 to this date.

4 Q. And, as far as you remember, about how many machines of that class did you use up to 1880?

A. I should judge from six to eight machines.

5 Q. Did you take a license under the Crosby & Kellogg Patent, so-called?

A. The firm did.

6 Q. Is this the license which you now produce?

A. Yes, sir.

Paper offered in evidence. Signature to it admitted by complainant's counsel. Marked "Defendant's Exhibit Sidenburg License."

7 Q. Did your firm actually pay to Mr. Kursheedt the sums of money agreed to be paid by said license?

A. We did.

CROSS-EXAMINATION BY MR. MILLIKEN:

1 x-Q. Who negotiated for this license?

A. I could hardly answer that question positively now, after the lapse of twelve years. I am not positive whether my brother or myself.

2 x-Q. Who represented the other side in that negotiation?

A. I cannot positively say; I believe it was Mr. Alexander E. Kursheedt.

3 x-Q. You have a good and extensive reputation in the trade, have you not?

A. I believe so.

4 x-Q. Would not the fact that you had recognized this patent and taken a license greatly influence other persons to take licenses?

A. It might with a few smaller manufacturers.

HENRY SIDENBERG.

Sworn and subscribed to before me.

GEO. F. BETTS,
Special Master.

Mr. Milliken objects to all evidence or to license.

Defendant's counsel herewith produces samples of ruffles sent by Mrs. Smith to plaintiff's counsel through a messenger, in accordance with a request of plaintiff's counsel on her cross-examination, and admits that said samples are the ones called for, made by Mrs. Smith, as testified to by her.

They are marked "Smith's Samples of Ruffles, March 4th, 1890.

Adjourned to 11th inst., 11 A. M., at Mr. Milliken's office.

MARCH 11th, 1890.

Present—MR. MILLIKEN for complainant, and MR. WETMORE for defendant.

Defendant calls DAVID KISCH (sworn):

I am 42 years of age. I live at 105 East One Hundred and Fourteenth street, New York City. Am a manufacturer of ruffles at 22 Lispenard street in this city.

1 Q. During any part of the time between 1872 and 1880 were you engaged in the ruffling and plaiting business in this city?

A. I started business in 1875 under the style of Kisch & Simpson, and continued it under that firm until 1885.

2 Q. Did you use roller-plaiting machines in your business?

A. I did.

3 Q. How many and how long?

A. I purchased my machines in 1877, about four, and used them until I left the firm in 1885.

4 Q. Did your firm take a license under the Crosby and Kellogg Patent through Mr. Alexander E. Kursheedt, and was that license in writing?

A. We did, and it was in writing.

5 Q. What has become of that license, and what efforts have you made to try and find it?

A. I don't know what has become of it. I have requested my former partner, who has charge of the books and papers of the old firm, to make a thorough search for the same, which he did, and failed to find the license.

6 Q. Have you looked among all the books and papers in your possession where it would be likely to be?

A. I have none.

7 Q. Do you know any place to look for the paper that has not been searched?

A. No.

8 Q. Did you read the paper, and do you remember the substance of its contents?

A. I did read it, and I remember its material points.

CROSS-EXAMINED BY MR. MILLIGAN AS TO THE LOSS OF THE PAPER AND HIS SEARCH FOR IT:

1 x-Q. When did you last see the paper?

A. I don't recollect.

2 x-Q. Can you recollect within five years?

A. No.

3 x-Q. Can you within ten years?

A. I cannot recollect anything at all about seeing it after it was first in my possession in the fall of 1880.

4 x-Q. Where was it then?

A. We put it in the safe.

5 x-Q. Have you ever made any search for it yourself, personally, since?

A. I have not.

6 x-Q. Do you know, of your own knowledge, that any other person has?

A. Yes, sir.

7 x-Q. How do you know it?

A. My partner told me so.

8 x-Q. Have you any other knowledge of any search having been made except what your partner told you?

A. No, sir.

RE-DIRECT EXAMINATION:

9 Q. After the dissolution of your firm, did your partner, Mr. Simpson, retain all the papers and books of the firm?

A. Yes, sir.

10 Q. And you requested him to find this paper and give it to you?

A. I did.

11 Q. So far as you are personally concerned, do you know any place where the paper might probably be found, if it is not among the books and papers of your former firm, in the possession of Mr. Simpson?

A. No.

The following testimony is taken, subject to motion of Mr. Milliken to strike out as hearsay and incompetent.

12 Q. Please state, if you remember, whether the license covered the whole period that you used the roller-plaiting machines prior to the expiration of the patent, and what was the sum of money provided to be paid the owner of the patent for such use, and whether you actually paid such sum.

A. The agreement was made to pay for the past use and for the future use, until the expiration of the patent, the sum of one thousand dollars, the payments to be made $400 each; the patent having only ten years and a half to run. Actual cash payments were made, and a liberal discount was allowed for anticipation of those payments.

Cross-examination waived.

DAVID KISCH.

Subscribed and sworn to before me.

GEO. F. BETTS,
Special Master.

176 EDMUND WETMORE (sworn):

I reside in the City of New York and am counsel for the defendants in this action.

1 Q. Do you know whether or not an injunction was issued by this Court restraining the use by the defendants of the machines held to be an infringement in this suit, because they also infringed the Pipo patent?

A. I do know that such an injunction was issued, and herewith produce a certified copy of the same, and also a certified copy of the order directing the said injunction.

Marked "Defendant's Exhibit Pipo Injunction" and "Pipo Injunction Order."

2 Q. State the facts under which this injunction was granted?

A. The injunction and order were issued and granted at the time they respectively bear date. I personally argued the motion upon the merits. The infringing machines referred to in said injunction and order were the same machines subsequently held to be an infringement of the Crosby & Kellogg Patent, and, to the best of my recollection, the identical machines used and marked as the infringing exhibit in this suit were used as the infringing exhibit on that proceeding, and this injunction was never removed or modified during the continuance of the Pipo Patent, and the suit is still pending.

EDMUND WETMORE.

Cross-examination waived.

Subscribed and sworn to before me.

GEO. F. BETTS,
Special Master.

Adjourned to 15th inst., 11 A. M., at the office of Mr. Milliken.

Omission here. See page V. of *errata*, folio 19.

177 1890, DECEMBER 3D.

CROSS-EXAMINATION OF JAMES M. HICKS BY B. H. LEE, ESQ.:

1 x-Q. How long have you been practically acquainted with sewing machine mechanism?

A. My first practical knowledge of sewing machines began in the year 1857, and continued with more or less intimacy until about 1865. Have had considerable acquaintance with sewing machine devices off and on since that time.

2 x-Q. Please state particularly and fully whatever experience you had in regard to sewing machine mechanism in or prior to the year 1862?

A. I was engaged in the fall of 1858 with the Ladd & Webster Sewing Machine Co. of Boston, working in the shop as a mechanic for about a year; after that, until the breaking out of the Rebellion, I was engaged in the factory as an assistant to my brother W. C. Hicks, having general charge of the inspecting department and a

great deal of the office work and other general work, and previous to that, in the spring of 1857, I was largely, or I should say frequently, with my brother in the factory of the Grover & Baker Sewing Machine Co. in Boston. My brother was employed in designing new machinery for the construction of the Grover & Baker machines from the time of the breaking out of the war until about 1865. I lived with my brother the greater part of the time, and he was engaged designing and experimenting upon new and improved forms of sewing machines, and I was associated more or less with him in these experiments and new designs. The Ladd & Webster Co. ceased making sewing machines, I think, in the fall of 1860–61, and my practical connection with making sewing machines ceased at that time. My connection with the business was such as to give me from 1857 to 1860–1 knowledge more or less of outside machines as well as of those in the factory where I was employed. From the fall of 1860 to spring of 1862 I was engaged in the Spencer Rifle Co., in getting up machinery for making guns.

3 x Q. Prior to your going into the business of making machinery for guns, did you have a general acquaintance with the various feeding mechanisms used in sewing machines, and, if so, describe the various devices used for feeding the cloth or substances to be sewed through the machines. Please describe all that you can now think of.

A. I was more or less acquainted with the different mechanisms. I cannot say that I knew all that were used. What was called the wheel feed, which was used in the old Walter Hunt machine; the Ladd & Webster and the Singer Manufacturing Machine and in one form of the Grover & Baker machine, I think, consisted of a wheel located beneath the table of the machine, the top of the wheel projected up through a slot in the table near what is called the needle slot; the outer circumference of this wheel was roughened. This feeding wheel was constructed to revolve intermittently upon a stud or central bearing located beneath the table near its front portion. The intermittent circular motion of this feed wheel was produced by a lever arm connected to the working shaft of the machine and arranged to take or engage with this circular feed wheel, so that by the revolution of the main shaft this wheel was ratcheted around. The distance to which the surface of the wheel was caused to revolve was adjustable, so that a longer or shorter stitch could be made by the machine.

The feed which was used by the Wheeler & Wilson, the Grover & Baker family machine and, I think, in one form of the Singer, is what is called the four-motion feed, in which a bar having a flattened roughened surface projected up slightly through a slot in the table close to the needle slot and was driven backward and forward to feed the cloth up and down to engage with and to release it from the cloth by mechanism worked from the main shaft, in which an eccentric pin worked in a slot in this roughened feed bar to give it these four motions. This bar and mechanism was located beneath the table of the machine. The extent of these motions was adjustable, the four motions were not the same as to their machinery in all the machines.

I will now mention the Wickersham top feed, which consisted of a mechanism located above the table of the machine, driven by a lever motion from the main shaft below the machine. It had a pendant lever and arm operated in a bearing on the goose neck of the machine. On this arm there were two practically horizontal feeding plates which engaged with the top of the cloth and moved it forward. The extent of motion of these feeding blades was adjustable. The precise mechanism I am unable to give. That is substantially all that I can remember now.

4 x-Q. Are wheel feeds and four-motion feeds used down to the present day?

A. I think they are.

5 x-Q. Between 1857 and 1860–1 did the presser foot of a sewing machine vary in form?

My recollection is that they did. Different machines used different forms of presser foot. Substantially the same form of presser foot was used for wheel feeds, and a different shape of foot was afterwards used for the four-motion feed. It was found that a presser foot taken on to the side of the feeding mechanism caused the work to feed oftentimes away from the direct line, and the foot and the roughened surface of the feeding bar were both changed so as to hold the cloth more evenly, and upon both sides and in line of the needle.

I also remember in the early days of sewing machines, I don't remember the exact date, the roller-top presser foot, which held the cloth upon the table over the feed wheel, which consisted of a roll working upon a stud on the presser foot above the table.

6 x-Q. Describe particularly the feeding mechanism of the Griffith and Fanning machines, and state how, if at all, it differs from an ordinary wheel feed?

A. The feeding mechanism of the Fanning machine consists of the main shaft. On the end of this main shaft is a slotted disk, in which is secured by a tightening key-headed bolt one end of a connecting arm. This arm is capable of being adjusted by said tightening bolt to and from the centre of the said disk to adjust its eccentricity therein, and consequently the extent of motion of the arm attached thereto. The other end of this connecting arm takes on to a pin on the end of a lever which operates a ratchet mechanism which takes it into the teeth of the gear on the lower roll. The upper roll is provided also with a gear of the same size as the lower roll, and meshes into it. The said upper roll is held in bearings adjustable up and down above the under roll so that it presses upon said under roll, or the cloth which may be passing between them, and is pressed down by means of a lever arm which bears on the sliding boxes of the upper roll and presses it down. The two rolls being geared together travel as to their circumferential surfaces at the same speed and positively. In the wheel feed of the sewing machines before described, in which the upper roll on the presser foot revolved in connection with the revolving wheel feed beneath the cloth, the upper roll did not revolve positively, but was turned by frictional contact with the cloth. The pressure of this upper roll was made by spring pressure, while in this Fanning machine the

pressure is given by a weight. Both rolls in the Fanning machine are supported in bearings, one at each end, while, in the sewing-machine mechanism referred to, revolving wheels are held on one bearing only.

The mechanism for driving the rolls in the Griffith machine varies somewhat from the Fanning machine mechanism, in that the adjustability of the motions of the rolls is made by changing the position of the end of the driving connection-rod on the ratchet arm to give it more or less eccentricity from the centre of motion of said ratchet arm. The upper and lower rolls are held in bearings, one at each end of each roll, and are geared together to give equal circumferential speed. The sliding boxes in which the upper roll is held are adjusted by screws, which press down upon springs located between the lower end of said adjusting screws, so as to make a stronger or feebler spring-pressure upon the upper roll and vary its relation to the under roll. Substantially the same difference exists between this mechanism and the mechanism of the sewing machine before referred to.

7 x-Q. Is there any substantial difference between the Griffith and the Fanning machines in reference to any of the matters embraced in the last question?

A. In the Griffith machine the upper roll is capable of being raised away from the under roll by means of levers, one at each end of the roll, which levers bear by leverage taken on the frame of the machine, so as to lift the sliding boxes upward. Both the under rolls in the two machines are of metal and hollow to provide for internal heat. In other respects they seem to me to be substantially the same.

8 x-Q. (Last question repeated.)

A. There is no substantial difference between the feeding mechanism of the Griffith and Fanning machines.

Adjourned to 4th inst., 10:30 A. M.

NEW YORK, December 4, 1890.

Present—B. F. LEE, ESQ., for complainant; EDMUND WETMORE, ESQ., for defendants.

CROSS-EXAMINATION OF MR. JAMES M. HICKS CONTINUED:

BY MR. LEE:

9 x-Q. Look upon the lower roller of the Griffith machine and state whether it is not substantially an old-fashioned wheel feed?

A. So far as the operating mechanism is concerned, it is substantially the same. The old-fashioned wheel feed was roughened on its surface to do the feeding, while in this machine referred to the roller is smooth, and relies upon the operation conjointly with said lower roll of the upper roll to do the feeding.

10 x-Q. What is the office of the upper roll of the Griffith machine? Does it not act as a presser-foot?

A. It acts substantially as a presser-foot, with the additional function of assisting in feeding the material between the rollers.

11 x-Q. In a sewing machine how is the presser foot constructed?

A. The presser-foot consists of a bar acting vertically, held down upon the table of the machine or the material thereon by spring pressure. The spring is usually a flattened spring fulcrumed at a point distant from the presser-foot bar at one end pressing upon the top, or upon a shoulder upon said presser-foot bar. In some cases a spiral spring has been used, surrounding the upper portion of the said presser-foot bar.

12 x-Q. Can you find any similar spiral spring in the Griffith machine for the purpose of pressing down the upper roll, and causing it to act as a presser-foot? If so, please point it out and describe it.

A. I find above the sliding boxes which carry the bearings of the upper spiral springs, one on each end, surrounding a screw for adjusting the tension of the spring which presses upon said bearing. It is substantially the same as the spiral spring around the presser-foot bar of the sewing machine, with the exception of the means provided in the Griffith machine for varying the tension of the spring. There were also means provided in sewing machines, as I remember, for increasing the tension of the spring, substantially the same in operation as in the Griffith machine.

13 x-Q. Was there not also in all, or in most, sewing machines, means for lifting the presser-foot off the goods?

A. Certainly.

14 x-Q. Do you not find similar means for raising the presser-foot in the Griffith machine?

A. I find means in the Griffith machine for raising the upper roll off the or away from the under roll, in substantially an equivalent manner. It consists, in the Griffith machine, of two levers, one located upon either end of the upper roll, which, as I described yesterday, takes under the sliding boxes to raise them up.

15 x-Q. Is not this lifting lever the same device that is used in an ordinary sewing machine to raise the presser foot?

A. It is a similar device and porforms the same office. A lever is used in ordinary sewing machines for accomplishing the same purpose and in substantially the same manner.

16 x-Q. Sa far as the upper roller in the Griffith machine acts as a feeder, is it not a mere duplicate of the lower roll?

A. It is, with the exception that the upper roll is covered with an elastic shell made of rubber, while the lower roll is rigid, and is a smooth metallic surface in the Griffith machine.

17 x-Q. You have spoken of the actuating machanism that operates the ordinary wheel feed in a sewing machine; how does that differ, if at all, from the mechanism used in the Griffith machine to produce intermittent action of the roll.

A. It is substantially the same.

18 x-Q. Have you ever examined the ordinary ruffling attachments to sewing machines that have been in use for the past fifteen or twenty years?

A. My attention has never been called specifically to ruffling attachments to sewing machines. I have seen ruffling attachments, but never examined them critically except in the machines which have been shown me in this case.

19 x-Q. Assume that such devices consist of a ruffling blade having motion to act as a crimper only, and not as a spacer, and having the usual four-motion feed of the sewing machine, and acting in other respects in a manner similar to the Crosby & Kellogg invention, which is in question in this suit, and state whether or not the four-motion feed would not necessarily act as a spacer?

A. That is dependent, in my opinion, upon whether or not in that mechanism described, there were means for folding the crimp and securing it previous to the action of feeding the cloth forward. Of course, any feeding apparatus intermittent in its action would space to the same amount that the feeding apparatus fed the cloth forward, under the conditions named.

20 x-Q. I think it possibly you did not understand the exact scope of my last question, and I therefore repeat it.

A. I think that if the crimper blade in an ordinary sewing machine carried forward the crimp beneath the presser foot on to the feeding mechanism, so as to be secured by the sewing mechanism—so that the fold is secured—that the four-motion feed would act substantially as a spacer.

21 x-Q. Would it not necessarily act as a spacer whenever the crimper, in forming the crimp, brought it within the grip of the feeding mechanism, whether sewing took place or not?

A. All intermittent feeding mechanisms on sewing machines are spacers, but, in the act of forming crimps or folds, I understand the word "spacer" to mean spacing to regulate the width of a plait or fold.

22 x-Q. Is it possible for a crimping blade to operate in a sewing machine having the ordinary intermittent feed without the feeding mechanism operating as a spacer to regulate the interval between each successive crimp?

A. That will depend upon whether the crimp or plait, as I understand, is fully formed and secured, so that, in passing beneath the presser foot and the feeding mechanism, the frictions will not pull out and destroy the plait.

23 x-Q. Assume that the plait is formed by the crimping knife wholly and completely, as the crimp is pressed by the knife into the grip of the feeding mechanism, and that the crimps are not secured (by which I presume you mean sewed together), but that nevertheless they go on through the machine without being unfolded, and thus destroyed, would not the four-motion feed or any other feed necessarily act as a spacer?

A. I think it would.

24 x-Q. Is it not equally true that the four-motion feed, in such a case, acts as a spacer, not only when the folds go safely through the machine, but also where they are marred or partially injured in passing through the feeding mechanism? In other words, so far as the spacing action of four-motion feed is concerned, has

that anything to do with the fate of the folds in finally passing through the machine?

A. So far as strictly the spacing action, in the sense of moving the cloth through the machine is concerned, the four-motion speed acts as a spacer, undoubtedly.

25 x-Q. And the same would be true of any other kind of feed, would it not?

A. Yes.

26 x-Q. You have spoken of the plaiting knife or blade of the Griffith machine and its operative part where it engages the cloth; is it one knife blade or a series of knife blades?

A. It is one blade divided into a large number of parts by slotting the plate so that the front portion where it takes onto the cloth is divided into a number of blades, probably about forty-three. I am so informed. I have taken off the upper plate, and I now find by inspection that the number is forty-three. I have counted them. The front edges of each one of these divisions of the plate are serrated or toothed, to take hold of the top of the cloth in pushing it forward.

27 x-Q. Are those serrations on each of the small blades that you have mentioned substantially like the serrations shown in figure 6 of the Crosby & Kellogg Patent No. 37,033.

A. They operate to all intents and purposes the same. They are substantially the same.

28 x-Q. On your direct examination, in answer to question 11, you say that in the Crosby & Kellogg feeding mechanism, or with the four-motion feed, as proposed by them, the formed plaits could not be fed without disarranging the plaits, unless said plaits were secured by the sewing mechanism, or some equivalent means. State fully your reasons for giving such an opinion?

A. My reasons were substantially as follows: That with a flat presser foot resting upon the upper surface of the fold or plait after it has been formed by the plaiting blade, the friction of said presser foot on the cloth would, when the under roughened surface of the feed attempted to move the cloth forward, hold against the cloth and cause a difference of friction between the two surfaces, or two parts of the fold, so that the feeding mechanism would pull out the plait. This answer refers to the four-motion feed proposed by Crosby & Kellogg, and also it refers to the mechanism shown in said patent for feeding the formed plait under the presser foot, wherein the presser foot holds the cloth upon the top of the feeding blade during the first portion of the retreat of said blade preparatory to forming another plait.

29 x-Q. Does not the last part of your answer refer to that construction of a Crosby & Kellogg machine where the spacing cam is in action, thus causing the knife to act not only as a crimper, but as a spacer?

A. Yes, where the spacer acts as a spacer and as a feed.

30 x-Q. Have you any other reasons to offer for the opinion that I quoted a few minutes ago from answer 11 of your direct examination?

A. Those are substantially my reasons.

31 x-Q. Is it not contemplated in the Crosby & Kellogg Patent that the action of the crimper, when it acts merely as a pusher by virtue of the spacing cam, shall, so far as the pushing action is concerned, be capable of being replaced by a four-motion feed?

A. In answer to that question I would say I read from the Crosby & Kellogg Patent, beginning with the words "We intend sometimes to add to the machine an ordinary rough-surface feed, acting below the cloth (at the time during which the crimper acts as a spacer), and feeding to the same extent that the crimper shoves the goods in order to aid the latter in forcing the finished crimp along when there is a heavy pressure upon the presser foot." In this paragraph he intends evidently to use the four-motion feed as an aid to the crimper while it acts as a spacer.

32 x-Q. Did you try any experiments in order to reach the result spoken of in your answer to cross-question 28?

A. I did not.

33 x-Q. In your answer to x-Q. 28 you speak of the friction of the presser foot on the cloth as disarranging the plaits after they have been formed, and when the feeding action comes into play. Is it not contemplated, in the case of a presser foot, to have the under service perfectly smooth?

A. I suppose, of course, it is understood that the under surface of a presser foot is intended to be smooth?

34 x-Q. Would not the danger of disturbing the plaits, which you think would exist, be entirely dependent upon the amount of pressure caused by the presser foot spring?

A. I think not. I think the ordinary weight of the presser foot and bar without the spring would be sufficient in delicate goods; in ordinary goods upon which frills are made, to more or less disarrange the plaits.

35 x-Q. Do you mean to be understood as saying that the degree of pressure of the presser foot has nothing to do with the matter?

A. I do not. I mean to say that the stronger the pressure upon the presser foot the more the plait will be disarranged, but that, even without any tension upon the spring, the weight itself of the presser foot and bar would cause a disarrangement of the plait, under the circumstances spoken of.

36 x-Q. Is it not true the less the pressure while the goods are moving through the less the liability to derangement; is that your view?

A. Looked at simply as a matter of friction upon the goods, yes. But taken in connection with the fact that the amount of pressure upon the presser foot regulates the character and the perfection of the folded plait, and taking into consideration the fact that the more perfectly the plait is formed the less liability to derangement, taken in this light it is not clear to my mind that the pressure of the spring has all to do with the derangement of the plaits.

37 x-Q. What else has to do with the supposed derangements of the plaits which you assume would exist?

A. The grip of the roughened feed; where a roughened feed is used, upon the under surface of the cloth, and where the crimper is

used as a feeder and spacer, the pressure of the roughened teeth of the blade upon the cloth by the spring, which acts above it, and the pressure of the spring acting upon the presser foot, and through the cloth beneath the presser foot on to the spacing blade.

38 x-Q. Which does the rough surface feed operate upon during this action which you have been describing, and that you have assumed would be so dangerous to the perfection of the article produced—upon the plain part of the cloth not yet folded, or upon the upper part that has already been folded over?

A. Upon the under side of the straight, plain piece of cloth beneath the fold, and which, when the crimper acts, draws forward to form the under side of the fold.

39 x-Q. You have expressed the opinion, have you not, that the tendency of the action of the machine upon the folded cloth, where a presser foot is used, would be to pull out or undo the fold? Is that what you have meant by some of your statements upon the particular subject which we are now dealing with?

A. I have stated that the tendency of the feeding mechanism where a roughened surface feed is used in connection with the friction of the presser foot had a tendency to derange the plait, and also where the spacer of the Crosby & Kellogg device was used as a feed, that also had a tendency, in connection with the presser foot, to derange the plait. The former, in its forward motion, and the latter, in its backward motion; the one operating upon the under surface of the cloth, and the other operating upon the upper surface of the cloth; that is to say, the straight, unfolded portion, while the presser foot operates upon the upper member of the fold.

Adjourned to Friday, December 5th, 1890, at 2 P. M.

NEW YORK, December 20, 1890.

Present—B. F. LEE, ESQ., for complainant; EDMUND WETMORE, ESQ., for defendants.

CROSS-EXAMINATION OF JAMES M. HICKS CONTINUED:

BY MR. LEE:

40 x-Q. In your answer to x-Q. 5 you say that you remember the roller-top presser foot "in the early days of sewing machines." Was that before 1861?

A. I say that I cannot locate the exact date, but I should think that it was while I was in Boston. I left Boston in the spring of 1862. I am inclined to think that this class of roller-presser foot was used on leather-sewing machines that were made in Sudbury street in Boston as early as 1858 or 1859 while I was with the Ladd & Webster Sewing Machine Company.

41 x-Q. You stated that the rough-surface feed, when used in combination with a ruffling blade or crimper, would act upon the lower side of the unfolded cloth, while the presser foot would act upon the upper part of the formed fold, and at the same time you have suggested in several places in your deposition that the opera-

tion of the rough-surface feed would tend to pull out and thus destroy the fold. Will you explain, and, if possible, try to harmonize these statements.

A. The operation of the rough-surface feed upon the under side of the fold—that part of the fold which lies directly upon the feed itself—pulls the cloth forward and while the presser foot is acting upon the upper surface of the fold and resists, more or less, the motion of the cloth forward in agreement with the forward motion or the under portion of the fold, thus changing the shape of the fold, and permitting the feed at its next backward and forward motion to crowd up more cloth underneath the presser foot, and thus, by raising the presser foot by means of this cloth crowded under, would produce a general derangement of the regular action of the machine, and of course disarrange the folds.

42 x-Q. In your last answer did you have in mind a four-motion feed or a wheel feed, when you speak of raising the presser foot?

A. I had in mind when I spoke the four-motion feed spoken of in the Crosby & Kellogg Patent; but I would also say that any kind of intermittent feed would have a similar tendency of pulling the under side of the cloth forward. The wheel feed would not necessarily raise the presser foot.

43 x-Q. Will you point out in the Crosby & Kellogg Patent, that is the subject of this suit, any place where it refers to a four-motion feed, as distinguished from a wheel feed?

A. The Crosby & Kellogg Patent which I have just referred to speaks of a roughened surface feed acting below the cloth, but does not say anything about a four-motion feed; in that I was in error. The language of the patent is equally applicable to both a wheel and a four-motion feed.

44 x-Q. Is it not true that the tendency that you have referred to to derange the plait, as you suppose, spoken of in your last two or three answers, would be exactly the opposite of a tendency to "pull out" the plait?

A. No; because you can pull out the plait as well by operating from below as above. It makes no difference, so far as pulling the plait out is concerned, whether it is pulled out from the top of the fold or from the lower portion of the fold; it simply pulls out in a different direction.

45 x-Q. Does not the presser foot operate while the feeding is going on to flatten down the formed plait?

A. Not unless the folds or plaits are secured together in such a way that they can be drawn or pushed or fed positively beneath the presser foot.

46 x-Q. Do you mean to say that the four-motion feed, or wheel feed, operating on the under side of the cloth upon the unfolded portion can have any tendency whatever to pull out the formed plait?

A. I do. As I said before, it would draw the under portion of the cloth forward, while the upper portion of the plait has a tendency to remain stationary; therefore something must pull out.

47 x-Q. Are you equally certain that the operation of the smooth presser-foot surface, while the feeding is going on, is not to smooth

down the already formed plait in substantially the same manner in which plaits would be smoothed down by a flatiron if they were formed by hand and afterwards smoothed down ?

A. It does not operate in the same way.

48 x-Q. How long have you known feeding devices of sewing machines to be adjustable ?

A. Ever since I knew anything about a sewing machine.

49 x-Q. In mechanical contrivances, generally, where any part has a reciprocating motion, which it was desired to vary, has it not always, so far as you know, been usual to adopt means to lengthen or shorten the throw of the reciprocating parts ?

Objected to, and objection reserved.

A. It was a very common thing to do.

50 x-Q. Is it not stated in the Crosby & Kellogg Patent that the mechanism for reciprocating the crimper is to be made adjustable " in order to vary the time and extent of the motions of the rock-shaft, and consequently of the crimper ? "

A. The patent says : " It is best to make the rock-shaft arm adjustable upon the shaft, the connecting-rod pivots adjustable in the arm, and the cams adjustable upon the shafts, as shown in the drawings, in order to vary the time and extent of the motions of the rock-shaft, and consequently of the crimper." Farther on in the patent, the patent says : " The quantity of material taken up by each crimp depends upon the distance that the crimper vibrates rearward from the holder or holding line of the goods. The space between the crimps depends upon the length of the advance of the crimper after the crimp is formed, and in the machine shown in the drawings the range of motion of the crimper either to crimp or to space is adjustable. These motions in the machine shown in the drawings are derived from two cams, and there is a pause between them, but the motions may be derived from one cam, or from any other mechanical contrivance, and the motions may also be continuous."

51 x-Q. Does not the Crosby & Kellogg patent also say that the plaits may be formed by the crimper acting in conjunction with any agency acting as a compressor, " the object of the contrivance being to hold the goods at rest while the crimp is being made ?

A. It says in the patent " the needles alone will serve to hold the cloth while the crimp is being made, and we intend to use them for that purpose or any agency acting as a piercer like the needles, or as a compressor like the presser foot and table, the object of the contrivance being to hold the goods at rest while the crimp is being made." The patent does say that these agencies are intended to hold the goods while the plait is being formed.

52 x-Q. Does not the patent also say that " the crimp may be flattened down, while it is being formed by a spring surface acting above the crimper, in the same manner as the presser foot, but at a different period of the operation ?

A. Yes.

53 x-Q. You have portrayed the evils that you think would result from the heavy spring pressure of the presser foot ; does not the patent provide for the use of means to cause the presser foot

spring to relax its pressure to a certain extent, while the goods are moving through the machine ?

A. It does.

54 x-Q. Will you please accurately explain the operation of the adjusting devices which regulate the throw of the crimper in the Griffith machine ?

A. There are two adjusting devices on the Griffith machine for the purpose of regulating the throw of the crimper. The first one that I shall describe will be the adjustable slide in the crank disc, driven from the main shaft, which varies the eccentricity of the crank-pin from its operating centre, and thereby controls the forward as well as the backward throw of the plaiting knife. Now, as the plaiting knife, in its forward motion, must necessarily come to a fixed point, the second adjusting mechanism consists in shortening the point where the connecting rod takes hold of the crank; and through said crank to the knife mechanism, so that the proper distance to which the plaiting knife should travel forward can be regulated without interfering with the extent of the reciprocating motion of the blade.

Adjourned to Saturday, December 27, 1890, 11 A. M.

NEW YORK, December 24, 1890.

Present—B. F. LEE, Esq., for complainant; EDMUND WETMORE, Esq., for defendants.

RE-DIRECT EXAMINATION OF JAMES M. HICKS.

By Mr. Wetmore :

1 Re-d. Q. Assume that, as a mechanical feat, and by using a specially chosen material, heavily sized, a skilful mechanic and operator could between them manipulate the Crosby & Kellogg machine so that it could make plaits without sewing mechanism, with or without a four-motion or wheel feed, would that circumstance alter in any respect your opinion that such machine would be absolutely worthless and impracticable for the purpose of doing the plaiting in an establishment like H. B. Claflin's which was done by the roller machines held to be infringements in this case ?

A. It would not.

2 Re-d. Q. And, in your opinion, could that work be done for practical purposes by the Crosby & Kellogg machine as patented—whether enlarged to any size, used without the sewing mechanism, with or without a four-motion feed or wheel feed, as has been suggested in your cross-examination ?

A. I do not think it could. In fact, I think it would be practically impossible.

3 Re-d. Q. What, so far as you are acquainted with the prior history of the art, as contained in former patents, was the first patent relating specifically to the said side roller-plaiting machine, like the ones here in controversy ?

Objected to as incompetent, irrelevant and as calling for secondary evidence, unless the patent in question is produced.

Objection overruled, counsel having stated his intention of producing the paper.

A. I have not examined the state of the art of roller-plaiting machine critically, but so far as I have investigated I find the patent to James Orr, English Patent of 1867, to be substantially like the two machines shoken of as used by the defendant, the Fanning and Griffith machines, some of the minor details being different from the Orr Patent.

4 Re-d. Q. Please look at the document herewith shown you, and state whether or not it is a copy of the Orr Patent to which you refer ?

A. I hold in my hand a certified copy of the James Orr Patent to which I referred in my last answer.

Patent offered in evidence, and marked "Defendant's Exhibit Orr Patent."

5 Re-d. Q. Have you read, and do you understand, the specification of said Orr Patent, the certified copy whereof has just been put in evidence ?

A. I have, and think I do.

6 Re-d. Q. Please point out the principal features set forth in the said specification of the Orr machine, which are not contained in the Crosby & Kellogg Patent, and are contained in the Griffith and Fanning machines, held to infringe in this case ?

Objected to as irrelevant and incompetent, in view of the fact that the Orr Patent bears date many years later than the patent in suit, and that it is, therefore, incompetent for any purpose connected with the case, except to show the existence of a machine entirely open to the public, and not infringing in any respect the plaintiff's patent, and which could do the work contemplated to be done by the infringing machines and the patented machine.

Objection sustained. Exception.

7 Re-d. Q. Please state whether the said Orr Patent covers the said Griffith and Fanning machines ?

Same objection, ruling and exception.

Defendant's counsel offers to prove that the infringing machines were patented in England in 1867 to James Orr, and contain a large number of inventions of the said Orr described in said patent, and separate and distinct from the invention of the Crosby & Kellogg machine in suit.

Objected to so far as it refers to the Orr British Patent, and so far as the Griffith and Fanning machines are concerned, it is objected to on the sole ground that the whole matter has already been gone into in the direct examination of the witness.

The Master declined to entertain the offer, because he deems part of it improper and inadmissible.

8 Re-d. Q. Can you point out in said infringing machines any

inventions separate from the Crosby & Kellogg, and described in any other patent or publication, to wit, in the said Orr Patent?

Objected to on the same ground, so far as the Orr Patent is concerned.

Objection sustained. Exception.

9 Re-d. Q. Please state whether you find in said infringing machines any inventions, separate from the Crosby & Kellogg, not already described by you, referring, if you desire, to the specification of said Orr Patent for the purpose of refreshing your recollection?

Objected to so far as it refers to the Orr Patent, for the reasons already stated.

Objection overruled. Question allowed.

Exception by counsel for complainant.

A. I have examined the Orr Patent specification and drawing before referred to, and it does not refresh my memory, or enable me to point out any features in the Griffith and Fanning machines which I have not already referred to in my previous testimony.

10 Re-d. Q. Referring to the Griffith machine, does that contain the fourth claim of the patent in suit?

Objected to on the ground that that matter has already been concluded by the interlocutory decree and the judgment of the Court, as contained in the opinion upon final hearing.

Objection sustained. Exception.

11 Re-d. Q. Please state whether or not the model herewith presented serves to illustrate any part, and, if so, what, of the Crosby & Kellogg mechanism?

A. It does; it is an illustrative exhibit of the presser foot and the reciprocating plaiter blade, its shaft and the auxiliary presser or crimper presser for holding the blade upon the goods in its forward movement and releasing it in its backward movement.

Model offered in evidence, and marked "Defendant's Illustrative Model."

JAMES M. HICKS.

Read over by the witness, subscribed and sworn to before me this 24th day of December, 1890.

GEO. F. BETTS,
Special Master.

Adjourned to Tuesday, December 30, 1890, at 11 A. M.

NEW YORK, December 30, 1890.

Present—B. F. LEE, ESQ., for complainant; EDMUND WETMORE, ESQ., for defendants.

RE-DIRECT EXAMINATION of JAMES M. HICKS continued:

By Mr. Wetmore:

12 Re-d. Q. Referring to the passage in the Crosby and Kellogg specification, suggesting the use of the feed, please state whether or

not, in that passage or elsewhere in the specification, you find any suggestion that the Crosby & Kellogg mechanism may be used with a feed, or that it is possible to do so in either of the combinations of the second or fourth claim?

A. I do not.

13 Re-d. Q. Please explain briefly the only case in which you find the use of said feed suggested in said Crosby & Kellogg mechanism?

A. It is suggested in the passage before referred to which begins the latter part of the operation of the machine: "We intend sometime to add to the machine an ordinary rough-surface feed." The passage continues: "At the time during which the crimper acts as a spacer." There is nothing in the second or fourth claim which says anything about a spacer. It is evidently the intention of the patentee that this rough-surface feed should be used while the machine is combined with the sewing mechanism, and only then, because, a little further on, continuing, he says: "We also intend to attach a weight to the finished end of the frill not sufficiently heavy to draw the frill along, but so heavy as to aid in drawing it when the pusher does its work." Now, if the frills, as he calls them, were not secured by the sewing mechanism, or an equivalent, it is plain that a weight could not pull or assist in pulling the crimps along, except they were fastened. This suggestion in the patent is a mere suggestion; it is a means for overcoming a difficulty which the inventor conceives might occur. It is not such a description as would entitle the inventor to formulate a claim thereupon. It is not an alternate for anything; it is not an equivalent for anything in the patent; it is a mere means, as I said before, of remedying a difficulty which might occur in some of the operations of the machine.

RE-CROSS-EXAMINATION of MR. HICKS:

By Mr. Lee:

1 Re-x-Q. Is it your view that the second claim includes mechanism for spacing the plaits?

A. I think not.

2 Re-x-Q. Is it your view that the specifications of the Crosby and Kellogg Patent does not describe with sufficient plainness how the parts can operate to fold the crimps to an edge without spacing them, so as to make a practically operative machine?

A. I understand that the specification does give sufficient description for the operation of crimping and folding the goods to an edge, and it is claimed in the first claim of the patent, where it says, "a crimper acting substantially as described to crimp the goods," and then goes on to say, "and to space the crimps in combination," &c. In the second claim he says, "in combination a crimper and a smoother," but says nothing of the spacing action.

3 Re-x-Q. Can you not give me a direct answer to re-cross-question 2?

A. The specification does give sufficient description.

By Mr. Wetmore:

1 Re-D. Q. Assume that the crimper of the second and fourth claims should be held to include a crimper acting as a spacer, is there any function performed by the rollers of the Griffith and Fanning machine precisely equivalent to the function which would be performed by an ordinary rough-surface feed acting below the cloth at the time during which the crimper acts as a spacer, as set forth in the Crosby & Kellogg Patent?

Objected to on the ground that the hypothesis presented has already been the subject of the decision of the Court, the Court having held that the spacing operation was not involved in the second and fourth claims.

Question admitted, reserving the right to move at any time to strike it out. Exception.

A. There is not.

JAMES M. HICKS.

Read over by the witness, subscribed and sworn to before me this 30th day of December, 1890.

GEO. F. BETTS,
Special Master.

JOHN FISH, being duly sworn on behalf of the defendants, testified as follows:

BY MR. WETMORE:

1 Q. Please state your name, residence and occupation?

A. John Fish; Summit, N. J.; mechanical engineer.

2 Q. Are you acquainted practically with mechanics?

A. I am.

3 Q. How many years have you been occupied in pursuits which have made you familiar with the construction and operation of machinery?

A. Thirty-five years.

4 Q. Have you read and do you understand the specification of the Crosby & Kellogg Patent in suit?

A. I have and I do.

5 Q. Have you examined the two plaiting machines here present, known as the Griffith and Fanning machines, and do you understand their operation?

A. I have.

6 Q. And have you also examined Defendant's Exhibit Illustrated Model which I hold in my hand?

A. I have.

7 Q. Please state whether the Crosby & Kellogg mechanism can, in your opinion, operate to produce the same result which the Griffith and Fanning machines operate to produce.

A. It cannot.

8 Q. Please explain why it is that the Crosby & Kellogg cannot produce the result which is produced in the operation of the said

Griffith and Fanning machines—and in doing so, you may refer to the said model?

A. It cannot from the fact that the crimper, when it has made the fold or crimp upon the cloth, stops and waits for the needle—either one or both needles, whichever may be used—to secure that loop or crimp before the remainder of its motion is carried out. Now, at the end of its motion the needles pass down again through the cloth and secure the crimp already made. Now, the crimper passes back with the pressure of the foot upon it until it is relieved, so that if those needles were not in operation and you attempted to crimp the fabric, you couldn't make it practically successful. With this other machine that can be accomplished without these needles. In the Griffith machine, when the fabric is under the crimper and is passed into what we call the bite of the rollers, the further motion of the machine as the crimper moves back causes the rollers to compress the crimped fabric between the rollers and draw the crimping through straining the fabric straight, and as it draws compresses the crimp already made with sufficient tightness to cause the crimp to maintain its form. This cannot be accomplished practically by the Crosby & Kellogg machine.

9 Q. Is there any difference in the sharpness of the fold forming the crimp which the Crosby & Kellogg machine is adapted to make and that which the said Griffith and Fanning machines are adapted to make, and if there is, will you please explain how that difference arises?

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A. When the crimped fabric is pushed under the presser foot, the presser is received upon the fabric that is lying on the crimper. Now, the fold of the crimp, that is the extreme point of the crimped fabric, is at the outer end of the crimper, and the pressure of the foot upon the fabric is controlled by the backward motion of the crimper, as it recedes from the pressure toe; thus the only pressure to give sharpness to the crimped fabric is the direct pressure of the spring upon the surface of that toe. In the Griffiths machine the pressure brought upon the rolls is transmitted as a drawing and rolling action, and can transmit more effectively and directly all the compression strain put upon the rolls, causing the whole crimped fabric to be rolled down perfectly flat, so that in handling it practically retains its shape.

CROSS-EXAMINATION OF MR. JOHN FISH BY MR. LEE:

10 x-Q. What particular branch of mechanics have you been particularly occupied with within the last five years?

A. Planning and constructing automatic machinery of different kinds.

11 x-Q. Enumerate the different kinds?

A. Card-stamping machines, and machines for making paper cartridges for dynamite, steam engines, electric elevator machinery, lathes.

12 x-Q. What branch of mechanics were you particularly occupied with during the ten years preceding those five years?

A. Ice machinery, air compressors, rock drills.

13 x-Q. And during the time previous what were you particularly occupied with?

A. Propeller engines and general marine work, boilers, and all the machinery that is generally used on steamships.

14 x-Q. When did you first see the Crosby & Kellogg Patent, or a copy thereof?

A. Three or four days ago.

15 x-Q. Did you read it entirely through?

A. I did.

16 x-Q. Did you read it more than once?

A. I did.

17 x-Q. How much time did you spend in studying the specification and drawings of the Crosby & Kellogg Patent No. 37,033?

A. A couple of hours.

18 x-Q. When did you first see the Griffith and Fanning machines? 202

A. Yesterday.

19 x-Q. Have you seen either of them more than once?

A. Yes.

20 x-Q. Where and when, and how many times?

A. Here, now, yesterday and to-day.

21 x-Q. Did you examine them more than three minutes yesterday?

A. Yes, I should judge so.

22 x-Q. More than four minutes?

A. Possibly.

23 x-Q. Is that as near as you can come to the time that you spent yesterday in the examination of the Griffith and Fanning machines?

A. About that time. I don't know but what I was in ten minutes. I didn't count the time.

24 x-Q. Did you pass any cloth through either machine?

A. I did not.

25 x-Q. Did you pass any paper through either machine?

A. I did not.

26 x-Q. Have you ever seen a Crosby & Kellogg machine in operation?

A. I have not.

27 x-Q. Have you ever seen a Crosby & Kellogg machine at all?

A. No.

28 x-Q. Have you ever seen any plaiting or ruffling mechanism in operation?

A. I have.

29 x-Q. When last?

A. I remember seeing one at the Fair of the American Institute some years ago; I can't give you the exact date.

30 x-Q. What was the name of that machine?

A. I do not know.

31 x-Q. Did you see that plaiting mechanism at the American Institute as much as fifteen years ago?

A. It seems to me more like ten; it might be fifteen; I am not sure. 203

32 x-Q. Was that the first time you had ever seen any such mechanism, by which I mean plaiting mechanism?

A. No; I had seen the same machines, or similar machines before then, just as I had seen sewing-machines.

33 x-Q. Did you examine either the Griffith or the Fanning machine at all to-day, until you actually began to testify?

A. I did.

34 x-Q. Did you spend as much as one minute to-day in the examination of either machine, except during the time that you were actually testifying?

A. I did.

35 x-Q. Did you touch either of the machines to-day before you began to testify?

A. I did.

36 x-Q. Was that before or after the examination opened this morning?

A. Before.

37 x-Q. Did you turn the crank of either machine to-day before you began to testify?

A. I did.

38 x-Q. Did you spend as much as two minutes in your examination of either the Griffith or Fanning machine before you began to testify?

A. I did.

39 x-Q. How many minutes did you spend on either machine to-day before you began to testify?

A. About five.

40 x-Q. Did you pass any cloth or paper through either machine?

A. I did not.

41 x-Q. Can you tell me how the knife blade of either machine is constructed, and of what it is composed?

A. It is a sheet of steel.

42 x-Q. Does that apply equally well to both machines?

A. It might; might be either sheet steel or sheet iron; the operation of it would be precisely the same.

43 x-Q. Will you describe particularly the operating edge of the knife in the Fanning machine, without looking at it?

A. It is a straight edge.

44 x-Q. What do you mean by a straight edge?

A. There is only one definition of a straight edge, and that is a straight line.

45 x-Q. Is the same true of the Griffith machine?

A. It may or it may not.

46 x-Q. Do you mean that you don't know anything about it?

A. I mean that I haven't examined and tested the edge of that machine to know whether it is straight or not.

47 x-Q. Have you examined and tested the knife of the Fanning machine to any greater extent than that of the Griffith machine?

A. No.

48 x-Q. In your answer to the 44th x-Q. you define a "straight

edge." Do you mean by that an edge similar to that of an ordinary knife, or a paper cutter, such as would be used on an office desk?

A. No.

49 x-Q. Define more particularly, then, what you do mean?

A. Well, the nearest I can get to that is the old definition we used to have in our school books: "A straight line is the shortest line between two given points."

50 x-Q. And is it that kind of a line that would correctly show the acting edge of the knife in the Griffith and in the Fanning machines?

A. That would depend a good deal upon the fabric you were using.

51 x-Q. Will you explain how the particular fabric that you put in either of those machines that are now in this room would change the characteristics of the knife edge?

A. I cannot.

52 x-Q. Are those knives composed of rigid steel like an ordinary knife blade, or are they springy?

A. They are necessarily springy.

53 x-Q. Do you know that as a matter of fact, or do you infer it?

A. I know it as a matter of fact.

54 x-Q. How do you know it, as a matter of fact, that those blades are springy?

A. Judging from their thickness and their width, or length; I should have said length instead of width.

55 x-Q. Do you remember about how long the knife of the Fanning machine appeared to be when you looked at it?

A. No.

56 x-Q. Was it over a foot long?

A. About that.

57 x-Q. Was the knife of the Griffith machine about the same length?

A. About.

58 x-Q. Was the blade of the Griffith machine continuous along its entire straight edge of a foot or thereabouts?

A. It appeared to be.

59 x-Q. Are you sure it was not divided into two or more sections?

A. It might have been.

60 x-Q. Was it or was it not when you looked at it?

A. It did not appear to be.

61 x-Q. Did it have straight edge or saw-toothed edge when you examined that knife in the Griffith machine?

A. The edge was not visible.

62 x-Q. Please answer the same question in reference to the knife edge in the Fanning machine?

A. I do not remember.

63 x-Q. Did you examine it sufficiently to gain any knowledge on the subject?

A. I want to know what the meaning of "it" is?

64 x-Q. "It" means the knife edge, of course, in the Fanning machine. Now, please answer the question.

A. I did not.

206 RE-DIRECT-EXAMINATION of Mr. Fish:

By Mr. Wetmore:

65 Re-d. Q. Please examine the blade of both the Griffith and the Fanning machines, particularly in respect to their being straight-edged blades, and say whether or not you would call each blade a straight-edged blade?

A. The Fanning machine has got a straight-edged blade; and the Griffith has got a straight-serrated edge, as appears on examination.

66 Re-d. Q. Please explain what you mean, in your answer to the 50th x-Q., that the kind of line which would correctly show the acting edge of the knife would depend a good deal upon the fabric you were using?

A. If the fabric was baggy or soft, its action, or the action of the rolls in taking hold of the fabric, would be more certain and quicker under those conditions than if it was entered the whole length at once.

67 Re-d. Q. In respect to the differences which you have pointed out in the operation of the Crosby & Kellogg mechanism, and the Griffith & Fanning machines, is anything more than a mere inspection of the machines, and perusal of the patent, necessary to enable any mechanic familiar with machinery to perceive them?

A. I think not.

JOHN FISH.

Read over by the witness, subscribed and sworn to before me this 30th day of December, 1890.

GEO. F. BETTS,
Special Master.

Adjourned to Saturday, January 10, 1891, 11 A. M.

207 NEW YORK, March 31st, 1891.

Present—B. F. LEE, Esq., for complainant; EDMUND WETMORE, Esq., for defendants.

JOHN H. BROWN, called on behalf of the defendants.

DIRECT-EXAMINATION:

This witness being called in the absence of the Master and without due notice, it is expressly understood and agreed that his direct examination may now be taken in advance of the oath, the same, however, to go for nothing unless he is subsequently produced for cross-examination in the presence of the Master and is then sworn.

1 Q. What is your name, age, residence and occupation?

A. John H. Brown; age, fifty-three; residence, New York City; occupation, mechanical engineer.

2 Q. In what particular branch of business are you at present engaged ?

A. Constructing heavy ordnance.

3 Q. Have you constructed and operated machinery, and, if so, how many years have you been occupied in that business ?

A. I have been in the machinery business for 33 years.

4 Q. In the course of that business have you both constructed and operated machinery for ruffling and plaiting, and are you familiar with that class of machinery ?

A. I have, and am familiar with that class of machinery.

5 Q. Were you ever in the employ of the Kursheedt Manufacturing Company, of this city, and, if so, between what years, and in what capacity ?

A. I was in their employ for about eight years as superintendent of their mechanical department. Somewheres in the neighborhood from 1877—excuse me, 1867 to 1875 or '6. It was in that neighborhood.

6 Q. What was their business ?

A. They were manufacturers of ruffllings and lace goods.

7 Q. Did they employ in their factory roller-plaiting machines of the same general class as that to which the Griffith and Fanning machines, here present, belong, and, if yea, about how many of such machines did they have in operation while you were there ?

A. They did use roller-plaiting machines similar to the Griffith and Fanning, and I should judge they had from 25 to 30 of such machines in operation at the same time.

8 Q. Did they also employ sewing machines with ruffling or plaiting attachments ?

A. They did, quite a large number.

9 Q. Did you make any of the roller-plaiting machines or of the ruffling attachments for sewing machines which were in use while you were there ?

A. I made the greater part of both kinds of machines.

10 Q. And did you supervise their operation and keep them in repair ?

A. I did.

11 Q. Have you examined the Crosby & Kellogg Patent here in suit, a copy of which is herewith handed you (paper handed to witness).

A. I have.

12 Q. And do you understand the same ?

A. I do.

13 Q. Did the Kursheedt Manufacturing Company, while you were in their employ, use the so-called Crosby & Kellogg ruffler upon any of their sewing machines ?

A. They used very few machines that I should call Crosby & Kellogg ruffling machines. The most of the sewing machine plaiters that we used made more than one stitch to each plait or gather, whereas the Crosby & Kellogg machine only makes one stitch at each plait.

14 Q. In your opinion as derived from your general mechanical knowledge and experience, and especially from your

experience in the construction and operation of ruffling and plaiting machinery is the Crosby & Kellogg mechanism described in the patent adapted or intended to perform the same kind of work and produce the same kind of plaiting that is done by the Griffith and Fanning machines here present?

A. The Griffith and Fanning machines were designed for an entirely different class of work from the Crosby & Kellogg. The work could not be done on a Crosby & Kellogg machine that the Griffith and Fanning machines were designed to do and are capable of doing. The Griffith and Fanning machines, as you will notice, are made with a heating arrangement, and they are always heated in some way—usually by gas—before you can do any work on them. The heat is the great feature for holding the plaits in place, and without the heat, if you should plait woolen goods, which is the kind of goods most plaited on those kind of machines—I mean roller-plaiting machines—the goods would scarcely have a mark upon them after they had been passed through the machine. Another different feature in the roller-plaiting machines from the Crosby & Kellogg is the pressure between the rollers. They are worked with a very great pressure, and the heat and pressure combined hold the goods in plait so they can be attached to the garments that they are intended for, either by hand or with a sewing machine.

15 Q. When did you first make roller-plaiting machines, as well as you remember?

Objected to so far as it may tend to show prior knowledge on the part of the witness.

A. I think about the year '66 or '7, several years after this patent was granted.

16 Q. At that time, please state, from your knowledge of the art, whether or not, in your opinion, a mechanic could from the Crosby & Kellogg patent and his general mechanical knowledge have constructed a roller-plaiting machine like the Griffith and Fanning machines here present, without the exercise of invention and employing new devices and contrivances not found in said Crosby & Kellogg patent?

Objected to as leading and as immaterial.

A. I should like to answer that question in my own way. I knew of the Crosby & Kellogg machine quite a number of years before I ever saw a roller-plaiting machine. The first man who made roller-plaiting machines, to my knowledge, was Ferdinand Wutterich. He only manufactured them for the Kursheedt Manufacturing Company, and they paid him quite a large sum of money annually to keep him from building the machines for other manufacturers. The concern that I was with, at that time, The Indestructible Ruffle Company, wanted a roller-plaiting machine very much, and wanted me to build one for them, and I had not mechanical ability to build such a machine, although we were running quite a good many of the Crosby & Kellogg machines at that time.

17 Q. And, at that time, did you possess, to the best of your knowledge and belief, at least as much mechanical skill and knowl-

edge as was possessed by an ordinary skilled mechanic in that branch of machinery?

A. I think I did, and was employed by that concern to make improvements on the Crosby & Kellogg machine to enable it to do a certain kind of work that it would not do, because I was supposed to have more knowledge and skill in that line of business than any other man they could employ.

18 Q. Did you make the small roller-plaiting machine here present?

A. I did, or the design from which the machine was made from.

19 Q. When did you design this machine, if you can remember, about?

A. About ten years ago.

Questions 18 and 19, and the answers thereto, seasonably objected to as irrelevant and immaterial, inasmuch as the machine referred to is not in any way involved in this suit. Machine referred to marked for identification "Defendants' Exhibit Brown's Small Machine."

Adjourned until new notice.

Met pursuant to agreement.

Present—Counsel as before.

No cross-examination.

JOHN H. BROWN.

Subscribed and sworn to before me this 22d day of June, A. D. 1891.

GEO. F. BETTS,
Special Master.

Defendants rest.

EDMUND WETMORE,
Defendants' Counsel.

NEW YORK, December 21, 1891.

Present—B. F. LEE, Esq., for complainant; EDMUND WETMORE, Esq., for defendants.

ASABEL K. SMITH, being recalled on the part of the complainants, deposes and says:

BY MR. LEE:

1 Q. You have given estimates of the number of yards of plaiting made upon the Griffith machine and, to some extent, on the Fanning machine from 1873 to 1879, at the place of business of H. B. Claflin & Company; can you state approximately what amount of business was done by H. B. Claflin & Company during those years, based, of course, upon the amount of their sales?

Objected to as not in rebuttal and as immaterial. Objection overruled. Exception.

A. I cannot.

2 Q. Can you obtain such information?

Same objection. Same ruling. Exception.

A. I do not think I can.

3 Q. Can you tell us who is able to give the information asked for?

A. I don't think anyone can.

4 Q. Do you mean to say that none of the members of the firm that are now living can get the information that we are now seeking?

Same objection. Same ruling. Exception.

A. I do not know whether they can or not.

5 Q. What were these plaitings, so made upon the Griffith and Fanning machines, put on?

Objected to on the ground that it is already answered. Objection sustained.

6 Q. You have heretofore stated that the plaiting referred to as having been made on the Griffith and Fanning machines was put upon ladies' suits. Explain particularly what is known in the trade as a "suit," and state the material of which these garments were made?

Same objection. Objection sustained, except in regard to the inquiry as to ladies' suits.

Defendants' counsel objects to permitting the complainant to reopen this question, the witness having already been examined in the opening case by the complainant upon the entire subject.

Objection overruled. Exception.

A. A "suit" is known as a garment with a skirt and with a waist and sleeves.

7 Q. Was not a large amount of this plaiting that is in question here put upon cloaks?

A. No, sir; not one yard of it ever went on cloaks with us.

8 Q. Do you mean to say that all of it went upon ladies' suits?

A. Yes, sir.

9 Q. Do the books that have already been put in evidence show the number of ladies' suits that were made and sold by H. B. Claflin & Company during the years from 1873 to 1879, while these pleatings were being used?

Objected to as already answered, and as immaterial. Objection overruled.

A. They do not.

10 Q. What other books would be required in order to find out the number of suits, as inquired of in the last question?

A. There are no other books to show; the books give an account of all suits manufactured by us during the period mentioned. There were suits bought in the market and sold for which we cannot give an account of.

11 Q. Do you mean to say that you can give an account of all

the suits that you manufactured during the period in question, but not of those that were bought and resold; is that your meaning?

Objected to as relating to a subject upon which the witness has already testified.

Objection overruled. Exception.

A. I think I can of those manufactured, but not of those bought and sold.

12 Q. Will you please do so?

Objected to because the subject has already been gone fully into, and the defendant should not be called upon to go through the labor of producing substantially a new account as to the number of garments made and sold by them; and the subject inquired of in the question at this stage of the case; and further objected to as irrelevant and immaterial.

Objection overruled.

A. I will if I can.

13 Q. How soon will you be able to furnish such a statement?

A. In about three weeks.

14 Q. Will you be able at the same time to ascertain accurately or approximately the selling price of the suits just referred to?

Objected to as immaterial. Objection overruled.

A. I do not know whether I can or not; whether there are books to show that.

15 Q. The cost of the suits will be shown, will it not, when you make up the statement just referred to?

A. I think it will.

16 Q. And when you have ascertained the cost of the goods will it not be very easy to approximate the price at which they were sold?

A. No, sir.

17 Q. Explain the reasons for your last answer?

A. I do not know what profit was added to the cost of the goods.

18 Q. Do not the members of the defendants' firm or some of them know what profit was added to the cost of the goods?

A. They do not.

19 Q. Would not the sales books of the firm show this?

A. I think they would.

Complainant's counsel asks the Master to direct the defendants to produce a statement showing the number of suits manufactured by the defendant during the period covered by the infringement complained of, and showing also the cost of the same and the sum of money for which the same was sold.

Objected to as embracing matters covered by the statements and testimony already rendered, so far as the proposed account includes suits containing plaitings made upon the infringing machines, and so far as the same relates to the manufacture and sale of goods by the defendant, as calling for an account of matters foreign to the issues referred to the Master, and it is respectfully submitted that it is beyond his jurisdiction, under the order referring this accounting to him, to direct the defendants to render that part of the account

called for which substantially calls upon them to go into their whole business of making and selling ladies' suits on an issue as to the profit made by the use of a particular combination in a machine for the manufacture of trimmings in one class of said suits.

Counsel for complainants states that, as his object is to show the magnitude of the business done by the defendants in suits during the period of use of the infringing machine, he will be content with a general statement fairly showing the volume of the defendant's business, in suits, during the period in question without putting the defendants to the trouble of making up an absolute accurate account, if such general statement and fair estimate can be made promptly.

Request refused. Plaintiff's counsel excepts.

20 Q. In 1877 and 1878 you had personal charge, did you not, of the entire suit-manufacturing business of H. B. Claflin & Co.?

A. I did.

21 Q. State what other manufacturing business of that firm, if any, you had personal charge of in those two years?

A. Of the cloaks.

22 Q. In 1878, while you had charge of the suit-manufacturing business, did not that firm turn out suits to the value of $600,000?

Objected to as immaterial. Objection overruled. Exception.

A. No, sir.

23 Q. Five hundred thousand dollars?

Same objection. Same ruling. Exception.

A. I don't think they did.

23*a* Q. Are you sure that the volume of their business in 1878 did not reach $500,000 in the ladies' suits manufactured under your direction?

A. Yes, sir.

24 Q. $450,000?

A. No, sir.

25 Q. How about $400,000?

A. I do not think it reached that.

26 Q. Are you sure of it?

A. Yes, sir.

27 Q. How about $350,000?

A. I do not think it reached that.

28 Q. Are you sure it did not? I refer, of course, to the real value or the selling value of the garments.

A. Yes, sir.

29 Q. How about $325,000?

A. I do not think it reached that, even. I feel pretty sure it did not.

30 Q. Do you feel certain upon that point?

A. Yes, sir.

31 Q. How about $300,000 in 1878?

A. I do not think it reached that.

32 Q. Are you sure it did not?

A. I feel sure it did not.

33 Q. How about $275,000 ?

A. I do not think it reached that figure. I feel certain that it did not reach that figure.

34 Q. Are you absolutely certain that it did not reach $275,000 ?

A. Yes, sir.

35 Q. Did it reach $260,000 in 1878 ?

A. I don't feel certain about that.

36 Q. I suppose your answer would be substantially the same, would it not, if I directed your mind to the year 1877 instead of 1878 ?

A. It would.

Recess taken until 2 o'clock.

ASABEL K. SMITH.

FREDERICK A. KURSHEEDT, a witness on behalf of the complainant, being recalled, deposes and says as follows : 217

BY MR. LEE : 1 Q. Have you heretofore been examined as a witness in this cause ?

A. I have.

2 Q. Will you state in a general way the extent of your experience in the manufacture of plaitings and other trimmings designed to ornament ladies' garments ?

A. I have been engaged in the manufacture of trimmings of various kinds made from cotton, wool and silk and other materials, since the year 1870.

3 Q. Please state in a general way how extensive has been the manufacture of such articles by the concern with which you have been connected during that period ?

A. The business would vary according to the fashions of the periods, and would run from $100,000 to $200,000 or $300,000 in a year.

4 Q. Do you know of any other concern besides those with which you have been connected, doing a similar business, that have been reputed to have as large a business of this kind as yours ?

Objected to as incompetent and immaterial.

A. I know of no other concern in this country.

5 Q. Has the nature of your business been such as to enable you to judge accurately as to the quality of plaitings ?

Same objection.

A. It has.

6 Q. Will you please look at the samples of plaitings marked "Defendant's Exhibit Smith's Samples of Ruffles, March 4th, 1890, G. F. Betts, Special Master," and state your opinion as to their quality, and especially as to whether they are fit to be used as trimmings for ladies' suits ? 218

A. I should say that the samples offered me for examination are very imperfectly manufactured, and, in my opinion, are unfit to trim suits that would be offered for sale.

7 Q. Are you acquainted with the general nature of the business that has been carried on by H. B. Claflin & Co. in the City of New York in ladies' suits ?

Objected to as immaterial.

A. I only know of their business in that branch in a general way —that they had for some years a cloak and suit department—but am not conversant with the details of their business.

8 Q. What is their general business ?

Same objection.

A. So far as my knowledge goes they held themselves out as importers and jobbers of general dry goods.

9 Q. Have you had such experience in business as to enable you to know the trade requirements of those concerned which make ladies' garments upon which trimmings are placed, such as you have already spoken of ?

Objected to as immaterial, also as incompetent.

Objection overruled. Exception.

Each of the objections heretofore taken during the testimony to-day of this witness is overruled and exception taken.

A. I consider that I have.

10 Q. Has it been part of your business to keep informed from time to time in regard to the fashions that prevail in respect to trimmings for ladies' garments ?

A. It has been a very important part of my work and I have constantly studied the subject of fashions in trimmings during the past 22 years.

11 Q. State whether or not from 1873 to 1879, both inclusive, plaitings were fashionable for ornamenting ladies' garments and particularly what are known as ladies' suits ?

A. The fashion for wearing plaitings was in vogue during that period, and during certain of those years they had a very large sale, predominating largely over other styles of trimmings, particularly for summer garments made of wash fabrics.

12 Q. While plaitings were the predominant fashion for trimming ladies' suits, state whether or not it would have been practicable for a manufacturer doing an extensive business in turning out ladies' suits for sale, to dispense with the use of plaiting and to substitute other forms or methods of ornamentation, if he expected to keep up a profitable trade ?

Objected to on the ground that the witness is not qualified to answer, and the question is therefore incompetent. Objection overruled. Exception.

A. My opinion is that any cloak and suit manufacturer who could not have shown a line of goods trimmed with plaitings during the period when the fashion for such garments was in vogue, could not successfully have held his trade as against other manufacturing concerns who had suits trimmed with plaitings for sale.

CROSS-EXAMINATION BY MR. WETMORE :

13 x-Q. During the years from 1873 to 1879, did your business include the manufacture of plaitings upon the so-called roller-plaiting machine like the exhibits in this case, which are here present before you ?

A. It did.

14 x-Q. And during that time your firm was licensed to use such machines under the Crosby & Kellogg Patent in suit, as well as other patents pertaining to such machines, was it not?

Objected to as irrelevant and incompetent, and calling for secondary evidence. Objection overruled. Exception.

A. We had no license under the Crosby & Kellogg Patent until about the end of the period above referred to. I cannot recollect the precise time when we took a license under the Crosby and Kellogg Patent, but we took one.

15 x-Q. Enumerate generally the different kinds of trimmings that you made during that period?

A. We manufactured all styles of plaitings, embroideries of very many kinds, laces, bead trimmings, fluted trimmings, in fact an endless variety of trimmings for all kinds of garments, both underwear and outside garments.

16 x-Q. When did you first make plaitings on the roller-plaiting machines?

A. About the year 1870.

17 x-Q. And have you continued to use them down to the present time?

A. Yes.

18 x-Q. Have you used machines of substantially the same size as the Griffith and Fanning machines to which your attention has been called?

A. We had roller-plaiting machines constructed on the same principle as the Griffith now present, but of various sizes, the smallest having a roller from six to eight inches in length and increasing in size up to twenty or twenty-four inches in length.

19 x-Q. On what size did you make plaitings for ladies' suits?

A. The machines we used for plaitings suitable for ladies' suits were from 14 to 18 inches length of roller.

20 x-Q. When did you first have a machine at your establishment of the size last mentioned—from 14 to 18 inches?

A. We built machines of that size about the year 1871.

21 x-Q. When did you first use them for the manufacture of plaits for ladies' suits?

A. In the year 1871.

22 x-Q. What other kind of trimmings did you furnish for ladies' suits during the time that you were making plaited trimmings; did you furnish the large variety of trimmings of other kinds which you have already mentioned?

A. During the years 1871 to 1875 the bulk of the trimmings we sold for ladies' suits were plaitings, and about the year 1875 embroideries came in vogue and they were used as an article of trimming.

23 x-Q. And from that time have embroideries increased in proportion, or how has it been?

A. The fashion has constantly changed. Styles of embroideries that were sold from 1875 to 1879 have gone out of fashion entirely and still remain out.

24 x-Q. Have plaitings gone out of fashion as trimmings for ladies' suits ?

A. Plaitings in the forms and of the materials that were used previous to 1879 have gone out, but other styles of plaitings are still being used.

25 x-Q. In what year was the largest proportion of the trimmings for ladies' suits furnished by your firm, plaited trimmings made upon the roller-plaiters ?

A. As well as I can remember, it was about the year 1873 that we did the largest business in plaitings suitable for ladies' suits.

26 x-Q. And did your business in that line of plaitings continually diminish after that ?

A. I fail to remember the exact year when our business in those plaitings commenced to diminish, but it fell off about 1874 or 1875.

27 x-Q. In the year when you did the most, what proportion, according to the best of your recollection, did the plaited trimmings made on the roller machines bear to all the other kinds of trimmings furnished by you for ladies' suits ?

A. I should judge from 30 per cent. to 40 per cent.

28 x-Q. Did you make and sell the trimmings as an article of trade to the wholesale manufacturers of ladies' suits ?

A. We did.

29 x-Q. Did such manufacturers in any instances during this period furnish you with material to be plaited on your machinery ?

A. They did.

30 x-Q. And, so far as plaited trimmings were concerned, it was part of the business of your firm either to furnish such trimmings of any desired size, style or material and also to plait the goods for others, if orders were given to you for that purpose ; is that correct ?

Objected to as irrelevant. Objection overruled. Exception.

31 x-Q. Please state a little more particularly what is the matter with the Smith samples of ruffles ?

A. The samples shown me are defective ; first, the sizes of the plaits and the spaces between the plaits are very irregular ; the spaces vary from one sixty-fourth of an inch to an eighth, or possibly three-sixteenth of an inch. The plaits likewise vary in size and are not uniformly pressed down straight from one edge to the other. These defects are sufficient, in my opinion, to condemn the article as unfit for sale.

I refer to the two narrow patterns of the exhibits shown me. The wider pattern is very badly plaited, the plaits varying in size, and the same defect occurring in respect to the goods being plaited crooked from hem to hem.

32 x-Q. You have stated that in your opinion the alleged defects would render the specimens unfit for sale. Have you ever sold ladies' suits so that you can tell whether or not the fact that a ladies' suit trimmed with those specimens would render the suit unfit for sale ?

A. I have sold ladies' suits to a limited extent, and consider

myself competent to state that if the trimming on the suit is imperfect, the suit would scarcely be of the value of the material with the trimming taken off.

33 x-Q. Did you ever sell ladies suits with plaited trimmings?

A. I have.

34 x-Q. A trimming is used entirely for ornament, is it not?

A. Not always.

35 x-Q. Are trimmings, such as the specimens you have just referred to, used for any other purpose than ornament.

A. They might be used to cover some defect in the material forming the body of the garment, but in that case they would naturally ornament the garment.

36 x-Q. Is it your opinion from an artistic point of view, and to heighten the effect of the trimming, the slight irregularities you have pointed out in the specimens are not positive advantages, making the trimming far superior to the stiff uniformity produced by the regularity which you seem to think enhances instead of diminishing its ornamental effect?

A. My opinion is directly the opposite.

36½ x-Q. Where, so far as you know, do the fashions relating to ladies' trimmings in this country originate?

A. The general ideas of fashion in most cases originate in France. Occasionally they may come from England.

37 x-Q. Does the action of the great firms in this country who deal in ladies' dresses and costumes, have anything to do with the prevalence of fashion in respect to ladies' trimmings; that is to say, by pressing one kind of goods in preference to other kinds?

A. Only so far as they follow established lines and take up with the prevailing European fashions, which they may modify to a certain extent to suit the tastes of the American people.

38 x-Q. You say the plaitings were largely used on wash goods; after the goods were starched, washed and ironed, do the plaitings present any greater uniformity of appearance than the specimens you have examined?

A. A plaiting uniformly plaited would retain the same size of plait and space after being washed, and a careful laundress could fold the plaits into place and iron them down if she took enough time.

39 x-Q. Supposing the laundress not to be careful, and not to take time enough, the plaits, when ironed, would, so far as appearance is concerned, present as much irregularity as is seen in the specimens, would they not?

A. An incompetent laundress might make the plaitings look very bad, so that the garment could not be sold.

40 x-Q. Don't you think that for ordinary use on a ladies' ordinary lawn dress for the summer, intended to be done up in the domestic laundry, a trimming showing no more irregularity than the trimming of these specimens would be perfectly suitable for such use?

A. I do not.

41 x-Q. How large an experience have you had in the sale of ladies' suits, and when?

A. I have done a limited business in the manufacture of ladies' suits, but have sold costumes with the trimmings combined to a considerable extent during the last twenty years.

42 x-Q. Do you mean to say that a manufacturer, in your opinion, who didn't sell ladies' suits with plaited trimmings at a time when plaited trimmings were fashionable, but did sell all other kinds of ladies' suits and ladies' suits furnished with all other kinds of ladies' trimmings, couldn't sell what suits he did sell at a profit? And if not, why not?

A. What I said was this—that a manufacturer not having suits trimmed with plaitings when plaitings were in vogue would be unable to hold his trade, and for the same reason a manufacturer being without fashionably trimmed suits, or suits trimmed with the trimmings in demand at any time, would find it very difficult and almost impossible to do business, for the reason that customers take little interest in articles where the fashion is weak, unless they can get desirable goods from the same manufacturer.

43 x-Q. If they could get desirable goods from the same manufacturer they would buy them, would they not?

Question withdrawn.

43*a* x-Q. Then, to come down to particulars, do you mean to say that in your judgment H. B. Claflin & Company, if in the year 1875, for example, they had chosen to strike wash goods with plaited trimmings off their list, couldn't have sold ladies' dress silk suits with embroidered trimmings?

A. I do not say that they could not have sold any suits other than plaited trimmed suits had they not possessed plaited trimmed suits to sell, but in my opinion I believe their business would have been very much limited, and they could not have sold embroidered suits as a substitute to customers who wanted plaited trimmed suits.

44 x-Q. You say H. B. Claflin & Co. were importers?

A. They hold themselves out as importers and jobbers of dry goods.

45 x-Q. During the period to which you have referred, were ladies' suits trimmed with plaitings imported to this country from Europe?

A. They were.

46 x-Q. Suppose H. B. Claflin & Co. had during that period undertaken to supply the demand of their customers for plaited goods with imported goods, could they not have done that?

A. I do not think they could have done so successfully and competed with the American manufacturers of suits.

47 x-Q. Do you state that with regard to all suits, cheap as well as expensive?

A. The business, in my opinion, would necessarily have been greatly limited and the matter of duties on the imported suits would unquestionably have shut them out from competing with the American manufacture on the great bulk of the garments they would have required for sale.

48 x-Q. During that period?

A. During that period—1872 to 1879.

49 x-Q. During the same period, were the duties on silk goods

higher for a ready-made suit than upon the silk of which it may have been composed?

A. I believe the rate of duty was the same; but the increased cost, by reason of the duties having to be paid for manufacturing the garments abroad and the extra expense of freight, commissions, etc., would have been an important factor in increasing the cost of the imported garment, as also the fact that in Europe they were very much behind us in the matter of producing plaitings by machinery as economically as they were produced in this country.

50 x-Q. Can you state of your own knowledge that, during the period mentioned, it cost more to import a ladies' silk suit ready made than it did to import the silk and make it in this country—I am referring to silk goods?

A. To import one suit you could doubtless do so, or even two or three suits, so that they would cost less, landed in New York, than to make them; but, if you wanted a quantity—50 or 100 or any amount such as a merchant would require, of any particular style of silk garment—there is no question, in my mind, but that such quantity could have been produced for considerable less money than they could have been imported.

51 x-Q. You state that these plaitings were mostly used for suits; what, if you know, was the price at wholesale of these wash suits; I mean within rough limits?

A. They were all kinds of prices; suits made of domestic cotton goods were sold for $3 or $4 apiece at wholesale, and from that price up; the price of the goods was regulated by the material and trimmings.

52 x-Q. What was your price for doing this roller plaiting? I limit my question to the time you were working under a license.

Objected to as incompetent and irrelevant. Overruled. Exception.

A. After we took out the license I do not think that we did any work for others. For by that time plaiting machines were in very general use, and parties who had given us the work to do during previous years then had machines themselves and did their own work.

53 x-Q. Didn't your firm ever do any plaiting for H. B. Claflin & Co. after you got your license?

Same objection. Same ruling. Exception.

A. I do not remember doing that work for any one—H. B. Claflin or any one else—after we took our license under the Crosby & Kellogg patent.

54 x-Q. During this period there were other firms beside yourself did plaiting in the City of New York?

Objected to as irrelevant. Objection overruled. Exception.

A. For some years from the time we had our first roller-plaiting machines we had a monopoly of the business, but about the year 1874 other parties became possessed of these machines, and the number in use increased very rapidly. When I say monopoly, I

mean there was no other concern who did the work such as we could do to any extent.

55 x-Q. During this whole period it was possible, was it not, for H. B. Claflin & Co. or any other manufacturer to purchase these plaiting or have them plaited for them at establishments doing that business in the City of New York under licenses from the owners of the Crosby and Kellogg patent?

Objected to as irrelevant and incompetent. Objection overruled. Exception. Also objected to as calling for secondary evidence.

A. No, there were no such licensees who made those goods, and the licenses granted under the Crosby and Kellogg patent to such manufacturers were not granted until, as I have heretofore stated in my testimony, about the end of that period. Sometime around 1878.

RE-DIRECT EXAMINATION BY MR. LEE:

55 Re-d. Q. What is the proper definition of a "suit" or "ladies' suit?"

A. As I understand the trade meaning of the word, it is a garment composed of a waist or body covering and a skirt, but so made that it can be worn in the street without any covering or outside wrap.

56 Re-d. Q. What is meant by a "costume," which you have also spoken of?

A. A "costume," the term "costume" is most generally used to describe a certain quantity of cloth with a certain amount of trimming sufficient to make a suit or dress, but not cut or made up. These terms, however, the trade meaning of these terms, however, change from time to time.

57 Re-d. Q. Please explain a little more in detail what you mean by the expression in your answer to cross-question 41, where you say you have sold costumes with the trimmings combined?

A. I meant that I had sold large quantities of goods cut up at a given number of yards sufficient to make a dress being sold for a certain price, and the trimmings being included in that price.

58 Re-d. Q. Then the trimmings are all ready to attcah to the dress?

A. Yes; and sometimes worked on the fabric which forms the dress.

FRED. A. KURSHEEDT.

Adjourned to Tuesday, December 22d, at 2 P. M.

NEW YORK, December 22, 1891.

Met pursuant to adjournment.

Present—B. F. LEE, ESQ., for complainants; EDMUND WETMORE for defendants.

ALEXANDER E. KURSHEEDT, a witness on behalf of the complainant, being recalled, deposes and says as follows:

1 Q. Have you heretofore been examined as a witness in this cause on behalf of the defendants?

A. Yes, sir.

2 Q. Will you state, in a general way, the extent of your experience in the manufacture of plaitings and other trimmings designed to ornament ladies' garments?

A. I have been in the business since 1867, and during that time the firms and company that I have been associated with have made more or less of trimmings of various kinds.

3 Q. Has the business you have just described been an extensive one?

A. It has.

4 Q. Has the nature of your business been such as to enable you, to judge accurately as to the quality of plaitings?

A. Yes.

5 Q. Will you please look at the samples of plaitings marked "Defendants' Exhibit Smith's Samples of Ruffles, March 4th, 1890, G. F. Betts, Special Master," and state your opinion as to their quality, and especially as to whether they are fit to be used as trimmings for ladies' suits?

A. From my experience I should say that the exhibits are imperfect specimens of side plaitings. I should say that suits made therefrom, owing to the fact that the trimmings are imperfect, would be considerably depreciated in value, and that no reputable manufacturer would offer such goods as perfect goods.

6 Q. Are you acquainted with the general nature of the business that has been carried on by H. B. Claflin & Co. in the City of New York in ladies' suits?

A. Well, I only know that, about the year 1874 and subsequently they had a department for the manufacture of suits and, I think, other garments as well.

7 Q. Have you had such experience in business as to enable you to know the trade requirements of those concerns which, say between the year 1872 and the year 1880, made ladies' garments upon which trimmings were placed, such as plaitings?

A. Yes.

8 Q. Has it been part of your business to keep yourself informed from time to time in regard to fashions that have prevailed in respect to trimmings for ladies' garments?

A. Yes.

9 Q. State whether or not from 1873 to 1879, both inclusive, plaitings were fashionable for ornamenting ladies' garments, and particularly ladies' suits?

A. Yes; they were the recognized trimmings, especially for trimming suits made of cotton and linen fabrics.

10 Q. While plaitings were the predominant fashion for trimming ladies' suits, state whether or not it would have been practicable for a manufacturer doing an extensive business in turning out ladies' suits for sale to dispense with the use of plaitings and to substitute other forms or methods of ornamentation if he expected to keep up a profitable trade?

Objected to as incompetent and conjectural, as the witness has not been shown qualified to answer. Objection overruled. Exception.

A. It would not have been practicable.

11 Q. Will you mention any other forms of ornamentation for ladies' suits that were in use from 1873 to 1883?

A. Embroideries and laces.

12 Q. Will you please describe both and the mode of their use?

A. Embroideries and laces both come either as edgings or insertings. The plaitings which are in evidence, exhibits are edgings, and either embroideries and laces, which are also edgings, and are produced by machinery in the same widths as the plaitings, can be substituted for the same purpose.

13 Q. Are these three different kinds of ornamental strips sometimes used in combination—either all three in the same garment or any two of them?

A. It has been the fashion at times to use both these laces and plaited embroideries. They are far more expensive, however, than in using the goods in their original state.

14 Q. At how high a price have you known embroidered strips—say, four inches wide—to be sold per yard for the purpose of ornamenting ladies' suits?

Objection to as immaterial. Objection overruled. Exception.

A. Twenty-five to fifty cents a yard.

15 Q. Would the average price be about half-way between twenty-five and fifty cents a yard?

A. Well, I might explain in this way: In making up suits it is customary to use about an equal quantity of narrow and wide plaiting. The plaiting for the waist or body is generally about half the width of that of the skirt. It might be twenty-five cents for the body trimming and fifty cents for the skirt trimming.

16 Q. Referring to your answers to questions 14 and 15, how would the price of lace trimmings compare with that of embroidered strips?

A. Laces would have been equally or if anything still more expensive. This is from 1873 to 1883.

17 Q. Would the same have been substantially true from 1873 to 1879, inclusive, in regard to both laces and embroideries?

A. I don't think that laces or embroideries either could have been obtained in quantities at any price previous to 1876.

18 Q. Did you ever have any interest in or control over reissued Letters Patent No. 6,159, dated December 1, 1874, granted to George B. Arnold, for improvement in sewing machines, which is in evidence in this case as Defendant's Exhibit Arnold Reissue?

A. I was and still am attorney for George B. Arnold, under said letters patent, the power never having been revoked.

19 Q. Were licenses ever granted under said Arnold's patent for the use of the inventions described therein?

A. They were.

20 Q. Did you have charge of the granting of said licenses?

A. I had.

20½ Q. Were such licenses offered freely to those manufacturers who desired to use the inventions alleged to be claimed by said, or in said, Arnold Reissue No. 6159, to such manufacturers as were willing to pay the price of such license?

A. They were.

21 Q. Were these licenses granted upon a fixed schedule of prices?

A. Yes.

22 Q. If H. B. Claflin & Co., between December first, 1874, the date of said reissue, and at any time down to say, the beginning of 1880, had purchased a license or shop right to use the invention or inventions embraced in Reissue No. 6159, for the purpose of making trimmings for ladies' suits, how much would such license have cost them at the fixed price established by the owner of the patent?

A. They had no license, and could have obtained one by paying $500 per annum.

23 Q. Did other concerns in the City of New York or elsewhere, engaged in similar business within that period, avail themselves of this opportunity to buy licenses or shop rights?

A. They did.

CROSS-EXAMINATION BY MR. WETMORE:

24 x-Q. Do you know whether H. B. Claflin & Company were sued for infringement of the Arnold Patent, by the use of those machines?

A. They were.

25 x-Q. Do you remember when that suit was brought.

A. I do not.

26 x-Q. Do you remember whether an injunction was issued in it?

A. I do not.

27 x-Q. Did you have charge of that suit?

A. I directed the suit to be brought, but I was never present at any of the hearings in court or outside.

28 x-Q. Do you know whether that suit is still pending?

A. I believe it is.

29 x-Q. In the questions I shall hereafter ask you you will please understand that I refer to the period between 1873 and 1879 inclusive, unless otherwise stated?

A. Yes.

30 x-Q. Did your concern, either within or without the period named, ever make side plaitings by hand?

A. We did.

31 x-Q. About when was that, Mr. Kursheedt?

A. We made side plaitings by hand of certain fabrics only, owing

to the fact that these fabrics at that time could not be manipulated by machinery.

32 x-Q. What were these fabrics?

A. Fine laces, bobbinets and fine crapes.

33 x-Q. Is the material of the specimens you examined on your direct examination, lawn?

A. Well, they are known in the trade as Victoria lawns or cambrics?

34 x-Q. Are those specimens fair specimens of hand-made plaiting out of that material?

A. I have no recollection of ever having made to any extent any hand-made plaitings of such material.

35 x-Q. According to your best judgment what would you say on that subject?

A. Well, as a matter of fact, machine-made plaitings in these widths were made anterior to hand-made plaitings. The article is created by the machine, that is, with the invention of the machine. Before that time the trimmings of near a similarity were gathered, shirred or ruffled. I don't believe that any attempt to make a hand-plaiting of this width was ever made previous to the invention of the roller plaiter.

36 x-Q. Is it your opinion that the roller plaiter does better work for side plaiting for material like that of the specimen and width like that of the specimen, than plaiting done by hand?

A. A roller plaiter properly adjusted makes perfect plaiting; I mean by that that every plait is perfect in respect to the exact quantity of material taken up, and the space between the plaits is likewise perfect being always the same. Moreover, smaller plaits can be made by a machine than can be made by hand, so that it is impossible to make more than a rough imitation of side plaiting by hand.

37 x-Q. Then do you say that the specimens you have examined are fair specimens of what can be done by hand, and are only rough imitations of corresponding side plaiting of the same material and width done on the roller-plaiting machine.

A. Well, I should call them abortive efforts to imitate machine side plaiting.

38 x-Q. Can you answer the rest of my question?

A. Whether any one can accomplish the work by hand better than is done in the specimens exhibited would depend on the skill of the operator and the time given to the work. Possibly, if sufficient time and skill were employed, an imitation might be made close to the machine-made work.

39 x-Q. Then, is it your opinion that for the purposes of practical manufacture, it is not possible to obtain as good a result of side plaiting by hand as can be obtained by the use of the machine like the exhibit?

A. Yes; I consider that self-evident.

40 x-Q. Do you think these specimens would bear any better character if they were used as ruffling or ruffling trimming instead of plaitings?

A. No; they lack the essential characteristics of ruffling.

41 x-Q. What, according to your recollection, was the proportion at which you would estimate the number of ladies' suits trimmed with plaitings, as compared with all other kinds of trimmings, when the plaiting fashion was at its height?

Objected to as irrelevant. Objection overruled. Exception.

A. I should say that suits made of certain fabrics during that period could only be trimmed with plaited trimmings or flouncings. There were comparatively no other trimmings for suits of these descriptions. The taste for trimming suits has been a growing one, and the comparative cheapness of plaitings about this period stimulated the fashion.

42 x-Q. What are the fabrics to which you refer as trimmed exclusively with plaitings?

A. Linen and cotton.

43 x-Q. What was the proportion in other fabrics, as you estimate it? 235

A. They were not trimmed to any such extent with plaitings.

44 x-Q. Were fashion plates published during this period?

A. Yes.

45 x-Q. And those fashion plates showed, did they not, the various kinds of trimmings used on ladies' suits?

A. At that time fashion plates were not elaborated to the extent that they are at the present time. They showed chiefly the cut or general style.

46 x-Q. Didn't the fashion plates show the difference between a ladies' suit trimmed with plaitings and one without?

A. Well, I don't like to testify to that one way or the other without evidence. I can bring fashion plates of that date and put them in evidence. I do not like to testify to a matter of this kind from recollection when substantial proof can be offered.

47 x-Q. Can you state any of the persons or publishers' concerns that published fashion plates of good reputation?

A. Yes; during that period, we did as we do to-day. We furnished our plaitings to the largest fashion publishers in this country and they adopted them. Butterick's and Demarest's at that time.

48 x-Q. And are the plates, catalogues, trade publications of Butterick and Demarest during that time the leading publications of that class for the purpose of showing fashion in this country?

A. Well, Butterick's did, and do, considerably more than all the others together. Of course, there are local papers like "Harpers' Bazaar." But "Harpers' Bazaar" has been, with respect to its fashion matter, simply a republication of foreign fashion journals.

49 x-Q. Was box plaiting trimming used as well as side plaiting? 236

A. Towards the latter part of the period they were to a certain extent, but not equally with the side or kilt plaitings.

50 x-Q. Can box plaitings be made on the machines like the exhibit before you—Griffith and Fanning?

A. No; they can be altered, however, and improved so as to produce box plaitings as well as combination plaitings.

51 x-Q. Are plaitings now used to trim linen and cotton suits?

A. Side plaitings are used at the present time on the bodies on

making up what are called blouses. I do not think they are to any extent on skirts.

52 x-Q. What other trimmings are now used on linen and cotton goods for ladies' suits?

A. Laces and embroideries; but I might say the trimmings are not so essential as they were formerly, inasmuch as the goods themselves are much more fancy than they were during the period referred to. Fancy cotton and linen goods were then scarcely known; to-day the effects of laces and embroidery are interwoven into the fabrics themselves; even plaitings are made in the fabrics.

53 x-Q. Have ladies' suits ever been trimmed without either embroidery or plaiting—by silk or other material—different from that of the suit itself?

A. Well, it has never been used to trim washed suits with either silk or wool trimmings; the former would lose their color, the latter would shrink in the washing.

54 x-Q. How about suits of woolen?

A. Woolen suits are trimmed with silk.

55 x-Q. Take the cheapest kind of embroidered trimmings which might be substituted for plaiting; how much do you say it would cost a yard?

A. Twenty-five cents for narrow and fifty cents for wide.

56 x-Q. And how much would corresponding plaiting cost, taken grade for grade, as nearly as possible?

A. The plaiting takes up from two and one-half to three yards of material, according to the fullness, and the material was worth about half a cent an inch. That would be for four inches, taking three yards to make a yard of plaiting, six cents for the material.

57 x-Q. Were the embroidered trimmings made on strips to be inserted or sewed on suits?

A. Yes.

58 x-Q. Was the same material used for the embroidery as for the trimming?

A. No, not precisely; for embroideries they use somewhat heavier material.

59 x-Q. How much difference in cost?

A. No difference in cost.

60 x-Q. What is the labor for the cheapest kind of embroidery per yard on such material?

A. At that time there were no cotton embroideries made in this country. In fact, the manufacture of cotton embroideries has never been developed in this country.

61 x-Q. What does the labor upon any kind of embroidery of the simplest sort cost per yard?

A. Well, embroidery is paid for according to the number of stitches in a given pattern. It is possible, within a certain space of cloth, to put a lesser or greater number of stitches. A piece of cloth four inches wide might be embroidered, therefore, so that the work thereon would cost considerable. In estimating twenty-five cents for a yard of cotton embroidery four inches wide, I intended only a sufficient number of stitches to make it appear as embroidery;

nothing fine or elaborate. We make embroideries four inches wide, the work thereon would cost several dollars.

62 x-Q. What other kinds of trimmings were used for ladies' suits besides plaitings and embroideries and laces?

A. I know of no other.

63 x-Q. Are you speaking now with reference to linen and cotton goods?

A. You mean during that period; linen and cotton goods—wash goods.

64 x-Q. Were plaitings used to a much greater extent upon goods intended for summer trade than they were upon goods intended for the fall and winter trade? I refer to the period of consumption, and not of sale. 238

A. I think they were. I don't think that woolen plaitings could be made on those machines. I doubt whether silk plaitings could have been made on those machines.

65 x-Q. Why not?

A. Because I don't think the hem would pass through those machines without spoiling the goods.

66 x-Q. Were silk and woolen goods trimmed with plaitings?

A. Not made on roller machines of that description.

67 x-Q. And these machines are not, in your opinion, suitable for making either silk or woolen plaitings?

A. They are not. I would like to modify that—unless the goods were stiff finished.

68 x-Q. What do you call stiff finished?

A. Well, like a piece of writing paper.

69 x-Q. What materials in goods intended for fall and winter consumption are the exhibits referred to suitable to use for plaiting such goods?

A. Well, I presume that, of woolen goods, blacks could be done successfully, but in silk goods I don't think that either blacks or colors.

70 x-Q. Any other kind of fall and winter goods?

A. Woolen materials constitute what are known as fall and winter goods. Silk goods are used all the year around; and cotton goods are for spring and summer wear. I don't say as a fact that the work cannot be done in those machines. It is only my opinion that those machines are not suitable for doing cotton and linen work.

71 x-Q. To what extent were silk and woolen goods trimmed with plaitings as compared with other trimmings?

A. I don't think that silk goods were to any extent.

72 x-Q. How about the woolens? 239

A. They were used considerably a part of that period on woolen suits. Alpacas chiefly. Black alpacas were an exceedingly popular article during 1873, 1874 and 1875. I might say that during that period every woman in the country had a black alpaca dress, a costume. Every wholesale house in the country had their own special brands of alpacas.

73 x-Q. Were all the alpacas trimmed with plaitings?

A. It was the most popular trimming.

74 x-Q. During this period would it, in your opinion, have been impossible for a manufacturer of ladies' suits to have done a profitable business in fall and winter goods without the use of plaited trimmings?

A. Well, my best recollection is, and I believe it will be supported by collateral evidence, such as fashion publications, that black alpaca suits was the chief article of sale during those years and that the only trimming that was fashionable in connection therewith and used to any extent was side or kilt plaitings made of the alpaca itself.

I remember in 1873 that the firm that I was a member of thought so much of the fashion that when a machinist offered us a machine that would plait and hold in position alpacas at the same time, we paid him an enormous price for the machine besides making a contract with him to retain his services.

75 x-Q. (Question repeated.)

A. He could not have done business.

76 x-Q. Then if, during this period, H. B. Claflin & Company used these plaiting machines almost exclusively for linen and cotton goods, they could not in your opinion have done business in fall and winter goods unless they got their alpacas and other fall and winter plaitings done elsewhere?

A. No; because in answering previously I had forgotten entirely about alpacas; and the fact that they were a woolen fabric did not occur to me.

77 x-Q. Suppose, as a matter of fact, H. B. Claflin & Co. made but a trifling amount of alpaca plaiting or any other kind of woolen or silk plaiting, could they, in your opinion, during the period named, have done a profitable business in ladies' suits intended for fall and winter wear?

A. They could not have done a fall business in ladies' suits during those years without side plaitings.

78 x-Q. Could they, in your judgment, have done a profitable business if they only made a very small number of such alpaca, woolen or silk plaitings?

A. I have no knowledge whether they did or did not a profitable business during those years; but they certainly would not have been "in it," to use the common phrase, if they hadn't had suits trimmed with plaitings.

79 x-Q. (Question repeated.)

A. Well, I think I have answered the question. They certainly could not have done any business, and made any profit.

80 x-Q. During the period inquired of, were ladies' suits of wash goods made extensively in the City of New York?

A. I believe they were.

RE-DIRECT EXAMINATION by Mr. Lee:

81 Re-d. Q. What are percales?

A. Percales are a heavy French cotton fabric. There is no linen in them. They are entirely cotton.

Adjourned to Wednesday, December 23, at 11 A. M.

NEW YORK, December 23d, 1891.

Met pursuant to adjournment.

Present—B. F. LEE, ESQ., counsel for complainants; EDMUND WETMORE, counsel for defendant.

82 Re-d. Q. You have spoken of the suit that was brought on the Arnold Reissue No.6159; please look upon the certified copy of a bill and also of an answer, and also of the docket entries in the Clerk's Office, and state whether they are records concerning and forming part of the suit to which you refer in your cross-examination?

A. Certainly; they relate to the suit to which I referred.

The papers referred to are marked respectively "Plaintiff's Exhibit Arnold Reissue Bill," "Arnold Reissue Answer," and "Arnold Reissue Docket Entries." All December 23, 1891. G. F. B., Special Master.

83 Re-d-Q. Who had charge of the prosecution of that suit, and who was liable to bear its expenses on behalf of the plaintiff?

A. I was.

84 Re-d. Q. From the appearance of the docket entries it does not appear to have been diligently prosecuted; can you state any reason why you did not pursue it diligently? If so, please do so.

A. After the decision in the United States Supreme Court qualifying the value of reissues, Mr. Urner, the trustee of the patent, impliedly released me from that obligation in my contract, compelling me to prosecute infringers.

85 Re-d. Q. Can you refer to certain catalogues published by your concern in 1872 and 1873 that will serve to illustrate the standard trimmings of those days?

A. I can do so, understanding that the term "standard trimmings" refers to our brand.

86 Re-d. Q. Are you familiar with the machines known as the Arnold machine, and made as illustrated in the drawings of the Arnold Reissue No. 6159, and please state whether you are familiar with and understand said drawings?

A. Yes.

87 Re-d. Q. Could side plaitings be made upon the Arnold machine constructed as shown in those drawings?

A. They could not.

88 Re-d. Q. You have spoken particularly in your cross-examination of side plaitings made by machinery upon roller side-plaiters. Will you please look upon the machine now shown you, and state whether you ever used any similar machines for making side plaitings by machinery?

A. We used similar machines to the exhibit for making bias side-plaitings.

The machine referred to by the witness is offered in evidence, and marked "Plaintiff's Exhibit Bias Side Plaiter, Dec. 23, 1891, G. F. B., Special Master."

89 Re-d. Q. How early did you use such machines?

A. 1871.

90 Re-d. Q. And how long did you continue their use?

A. We have used machines of similar construction continually since that time.

91 Re-d. Q. Please refer to your catalogue dated 1872, and see if you can furnish us with a good illustration of plaitings such as were made by you on machines similar to the one last offered in evidence as an exhibit?

A. On page 19 of 1872 catalogue such bias-plaited flouncings are shown.

The page of the catalogue referred to is offered in evidence and marked "Plaintiff's Exhibit Bias Plaited Flouncings, December 23, 1891, G. F. B., Special Master."

92 Re-d. Q. State whether or not similar illustrations to the one just exhibited have appeared in your illustrated catalogue since 1872?

A. They have. They have appeared off and on down to the present time.

93 Re-d. Q. During the period embraced between the beginning of 1873 and the end of 1879, was it fashionable to ornament ladies' dresses with both embroidery and bias or straight plaitings in combination?

A. Yes.

94 Re-d. Q. Will you please point out on your catalogue dated 1872, specimens of what was referred to in the last question, shown in woodcuts?

A. On pages 14 and 15 are illustrations, the one on page 14 being a combination of embroidery and bias plaiting, and that on page 15 a combination of embroidery and straight plaiting.

The woodcuts referred to by the witness are offered in evidence and marked "Plaintiff's Exhibit A, E, K, 94*a*, Dec. 23, 1891," and "Plaintiff's Exhibit, A, E, K, 94*b*, Dec. 23, 1891, G. F. B., Special Master."

95 Re-d. Q. Were trimmings such as illustrated in the two last offered woodcut exhibits used for ladies' suits?

A. They were.

96 Re-d. Q. In the course of your cross-examination you were asked to make certain estimates with regard to the cost of plaitings four inches wide, and you stated in substance that the material of which such plaitings are composed would cost six cents to every yard of finished plaiting; would the cost be as high as that in all cases?

A. The figure stated would be the maximum cost, provided that the material was plaited full, or three yards to one, so that no spaces are shown between the plaits. If spaced, the cost of the material would be reduced proportionately. Plaitings are sometimes made taking only two to one. In such a case the cost would be reduced to four cents a yard of finished plaiting.

97 Re-d. Q. You have stated that during the years in question embroideries were also used for ornamenting ladies' suits that cost from 25 to 50 cents a yard. Suppose plaitings to be fashionable and in demand for the same purpose, and the cost of the material to be six cents a yard, would a manufacturer of ladies' suits have been de-

terred from complying with the fashion and putting side plaitings upon ladies' suits, if the labor of making the side plaiting had amounted to from 15 to 17½ cents per yard, thus bringing the total cost of the plaiting so used as trimming up to from 21 to 23½ cents per yard?

A. It would have made no difference to the manufacturer.

98 Re-d. Q. Even at the prices mentioned in the last question, would not the side plaiting be a cheaper trimming for ladies' suits than either embroidery or lace which you have already stated were the only other trimmings in fashion during that period?

A. I know of no other trimmings that were employed at that time that were as cheap, showy and fashionable as plaitings were, even at the prices stated in the question.

99 Re-d. Q. Have you any interest, directly or indirectly, in the Crosby & Kellogg Patent on which this suit is brought?

A. I have no interest whatever at the present time.

Defendant's counsel objects to Re-d. Q. 97 as incompetent and immaterial, and it is stipulated that the objection is made in time. Objection overruled. Exception.

RE-CROSS-EXAMINATION BY MR. WETMORE:

100 Re-x-Q. You say side-plaitings could not be made on the Arnold machine. Do you understand the Arnold Patent and the invention therein described?

A. I understand the invention and the patent; and, as shown in the drawings, side plaitings could not be made on those machines.

101 Re-x-Q. Do you understand the invention well enough to enable you to say that if the said invention was absent from the roller-plaiting machines like the exhibit, you could still make plaitings of any kind by the use of said machines?

Objected to as irrelevant and incompetent, calling for an opinion of the witness concerning a matter not referred to in the examination in chief or in the re-direct, and concerning which he is not shown to be competent to express an opinion; and particularly as calling for the construction of the claims of a patent in regard to which he has not been heretofore interrogated at all, the allusion to the drawing of the patent by complainants' counsel being solely for the purpose of conveniently calling the witness' attention to the construction of a well-known manufacturing machine. Objection overruled. Exception.

A. It is my opinion, and always has been, that the Arnold invention included the underlying principle of gathering, ruffling or shirring or imperfect pleating.

102 Re-x-Q. Is the machine, Plaintiff's Exhibit Bias Side Plaiter, the same one you used in 1872?

A. I have never seen that machine until to-day. I mean that identical machine.

103 Re-x-Q. What year was the decision in the United States Supreme Court qualifying the value of reissues rendered?

A. I know it was subsequent to 1881. I only know it as hearsay. I have never read the decision.

104 Re-x-Q. The replication in the Arnold suit was filed the 18th of December, 1873; why was nothing done in it from that time until you heard of the reissue decision?

A. I do not know, as a matter of fact, that there was nothing done. There were various suits, and, as is usually the case, there were delays through the engagements of counsel, etc., etc.

105 Re-x-Q. As matter of fact, was that the reason why the Arnold suit was not pressed, that a test suit was pending intended to determine the question whether the roller-plaiting machines infringed the Arnold Patent, and that, when that suit was decided and the said machines enjoined, Claflin & Company were already enjoined under the Pipo Patent and had ceased to use the machine, and, therefore, there was no need in prosecuting the remedy by injunction against them under the Arnold Patent?

A. I have no such recollection whatever in the matter.

106 Re-x-Q. Don't you recollect hearing of the circumstance of Judge Blatchford granting an injunction under the Arnold Patent against the use of said roller-plaiting machine?

Objected to as calling for secondary evidence, and as hearsay, and as irrelevant and incompetent. Objection overruled. Exception.

A. Yes, under the Arnold Patent.

107 Re-x-Q. Wasn't that a number of years before you heard of the reissue decision in the Supreme Court?

Same objection. Same ruling. Exception.

A. A few years.

108 Re-x-Q. Referring to your catalogue, was the trimming entitled "Alternate Insertions," page 12, used on any sort of ladies' suits?

A. They were all used more or less on suits made of white goods, as shown on page 18—all these trimmings.

109 Re-x-Q. And is the same true of the combination trimmings shown on page 25?

A. Yes.

110 Re-x-Q. Do you mean to say that a manufacturer would use embroidery trimming upon a cheap suit in the place of plaitings?

Question withdrawn.

110½ Re-x-Q. What was the highest price for plaitings made of expensive material?

A. The prices varied somewhat during that period. At the commencement, say in 1872 and 1873, ordinary cambric plaitings from two to three inches wide were sold at wholesale at about from $3 to $4 a dozen yards, as near as I can remember.

111 Re-x-Q. If I correctly remember the testimony, your concern used roller-plaiting machines substantially like the exhibit from about 1870 or 1871, and bias plaiters substantially like the Plaintiff's Exhibit Bias Side Plaiter from about the year 1872 until 1877,

when you took a license under the Crosby & Kellogg Patent, and continued to use the same thereafter; is that correct?

A. Yes; except that we began to use the roller plaiters in 1870, and the bias side plaiters in 1871.

Question and answer duly objected to as calling for secondary evidence in relation to the date of the Crosby & Kellogg license. Objection overruled. Exception.

112 Re-x-Q. At the time when you took that license did you pay the owner of the Crosby and Kellogg past damages, and how much did you pay, and for how many years and for how many roller-plaiting machines substantially like the exhibit?

Objected to as irrelevant and incompetent, and calling for secondary evidence.

Objection overruled on each ground. Exception as to each.

A. We paid back damages under the Crosby and Kellogg Patent, but the exact amount in money I cannot fix. We paid, however, $5,000 for damages to some time in 1873, and obtained a release at that time to that date. It cost us a very large sum, directly and indirectly, between that period and the summer of 1877 when the different suits in which my company was involved were all settled. And some of the moneys which have been expended were considered in the matter of settlement. There was no qualification with respect to the number of machines. It was a plenary settlement, and our license was in accordance therewith.

113 Re-x-Q. Was $5,000 paid exclusively under the Crosby-Kellogg Patent?

A. Exclusively.

114 Re-x-Q. Did you ever pay over to the owners of the Crosby and Kellogg Patent any sum of money additional to the $5,000?

Same objection, ruling and exception.

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A. Yes.

115 Re-x-Q. What is your best recollection as to the amount of cash in addition to $5,000 which you paid to the owners of the Crosby and Kellogg Patent for any use thereof preceding your license?

Same objection, ruling and exception.

A. My best recollection is that we paid $2,500.

116 Re-x-Q. How many roller-plaiting machines, as near as you can remember, did you use in your establishment from the year 1870 to the year 1877?

Same objection, ruling and exception.

A. I do not remember exactly, but the number did not exceed half a dozen in use at any one time.

117 Re-x-Q. How many Crosby and Kellogg machines did you use of all kinds, including the Crosby and Kellogg blade attachment to sewing machines?

A. I could not say definitely, because the machines were constantly being changed and improved, and the new machines were

substituted for the old. In some cases an improved machine would do the work of a number of those formerly employed.

Same objection, ruling and exception.

118 Re-x-Q. What, according to your best recollection, was the largest number of said machines, including said blade attachments, in possession of your concern at any one time during the period inquired of?

Same objection, ruling, exception.

A. I could not state definitely. I never concerned myself specially in regard to that part of our business?

119 Re-x-Q. Did you not employ a large number of Crosby and Kellogg machines, including said attachment to sewing machines, in your establishment besides the said roller-plaiting machines?

A. I cannot say positively or definitely in regard to the number of knife-plaiting sewing machines that we had during that period, but in the spring of 1874, when the agreement was made by the firm to take license under the Arnold Patent, when sustained, it was also agreed that we could at once stop conflicting with the Magic Ruffle Company, so that such sewing machines, with such attachments, could not have been used to any extent by my company after that date.

Same objection, ruling and exception.

120 Re-x-Q. Up to that time had you not used at least 100 Crosby & Kellogg blade attachments on the sewing machines in your establishment?

A. I don't think that we ever used at any one time one dozen of these machines.

Same objection, ruling and exception.

121 Re-x-Q. Then, when you said just now that you couldn't give any figures at all as to the number of such machines, because you didn't remember, you meant that you were certain that there were not over a dozen, but you couldn't remember how much less than a dozen there were?

A. My recollection is more in regard to the product of the machines than with respect to the number of machines themselves. I am positive now, from the fact that we had very few, if any, goods that we sold that could be, or were, made in such machine, that we did not employ them to any extent whatever.

Same objection, ruling and exception.

122 Re-x-Q. What, then, according to the best of your recollection, was the annual product in yards of plaiting or ruffling, or any other work done on the Crosby & Kellogg machines at your establishment, from 1870 to 1877?

Same objection, ruling and exception.

A. I have no idea to-day. The business during the first years was comparatively small—increased gradually.

123 R-x-Q. Can you state approximately for any one year?

Same objection, ruling and exception.

A. I cannot say.

124 Re-x-Q. Can you say whether or not such annual product, at the time when you were making the most of such goods, did or did not exceed a million of yards?

Same objection, ruling and exception.

A. I couldn't say.

125 Re-x-Q. Then you don't know anything about the number of yards product of plaiting, or similar work done on the Crosby & Kellogg machines at your establishment, at any time or for any period, do you?

A. I have no idea to-day of the quantity that we did during those years. If I should guess, I might make a very ridiculous one.

Same objection, ruling and exception.

126 Re-x-Q. You say you settled with Crosby & Kellogg or the owners of the Crosby & Kellogg Patent in 1873, and got a release; did you go on infringing the patent after that?

Same objection, ruling and exception.

A. Yes.

RE-RE-DIRECT EXAMINATION BY MR. LEE:

127 Re-re-d. Q. The settlement made by you in 1873 for $5,000 was for a lump compromise sum, was it not, paid in view of threatened litigation?

A. Yes.

128 Re-re-d. Q. And was not the subsequent payment made under the same circumstances?

A. Not precisely. It was a compromise sum to finish up the whole business. But there was a pending suit then, and not merely a threatened suit.

129 Re-re-d. Q. In the exhibit introduced from your catalogue of 1872 is the size of what is shown in the illustrations indicated on the page bearing the woodcut—each woodcut?

A. Yes; it is fully described, and correctly indicates the sizes we made the goods.

ALEX. E. KURSHEEDT.

Adjourned to December 26th at 11 A. M.

NEW YORK, January 2d, 1892. 251

Met pursuant to adjournment.

Present—B. F. LEE, ESQ., for complainants; EDMUND WETMORE, ESQ., for defendants.

HENRY S. BROWN, a witness on behalf of complainants, being recalled, deposes and says as follows:

EXAMINATION BY MR. LEE:

1 Q. Have you heretofore been examined as a witness in this cause?

A. I have.

2 Q. Is your business, now, the same, in character, as it was when you were last examined as a witness herein?

A. It is.

3 Q. Has the nature of your business been such as to enable you to judge accurately as to the quality of plaitings?

A. It has.

4 Q. Will you please look at the samples of plaitings marked "Defendant's Exhibit Smith's Samples of Ruffles, March 4, 1890, G. F. Betts, Special Master," and state your opinion as to their quality and especially as to whether they are fit to be used as trimmings for ladies suits?

A. They are not fit for trimming ladies' suits, and they are perfectly worthless.

5 Q. Do you mean worthless for the purpose of trimming any kind of garments?

A. Worthless for anything, except for rags. I threw such stuff as that in the rags.

CROSS-EXAMINATION BY MR. WETMORE:

6 x-Q. Are those trimmings a fair specimen of what can be made by hand?

A. No; I don't think they are; they could be made a great deal better if the proper time were taken to make the plaits and spaces even.

7 x-Q. And, if the proper time were taken, they would be good salable trimmings, would they not?

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A. If proper time is taken to divide off the spaces and plaits and crease them and stitch them down regular, a plait can be made by hand that would be salable.

8 x-Q. Then all you mean is that those, in your opinion, are not skillfully and properly made hand plaits, but they could be skillfully and properly made out of that very material and those very sizes by hand?

A. They could be, yes, if proper time was taken.

Adjourned to Tuesday, January 5th, at 11 A. M.

EXAMINATION OF HENRY S. BROWN CONTINUED BY B. F. LEE:

9 Q. Please look at Plaintiff's Exhibit Bias Side Plaiter, December 23, 1891, G. F. B., Special Master, and state how long you have known of the existence of that identical machine?

A. Since 1876 in the City of New York.

CROSS-EXAMINATION BY MR. WETMORE:

10 x-Q. Where did you first see it?

A. In Mr. Wooster's factory, in Duane street.

11 x-Q. When?

A. I think it was in the summer of 1876.

12 x-Q. Did it have these identical springs on it at that time?

A. As near as I can judge, it had. If they were not identical they were similar.

13 x-Q. Haven't a large part of the brasswork been replaced since that time?

A. There is nothing on it been replaced that I can see.

14 x-Q. Do you think the springs and brass are of the same age as the rest of the machine?

A. I think they are; those brass springs have been dipped in acid to brighten them.

15 x-Q. Where has the machine been since 1876?

A. A part of the time it was in my possession, but since then I couldn't say.

16 x-Q. When was it in your possession?

A. For nearly a year after 1876.

17 x-Q. Ever seen it since you parted with until it was shown you on this accounting?

A. I have.

18 x-Q. Where and how often?

A. I purchased it about a month ago and had it in my possession for a couple of weeks.

19 x-Q. Did you see it between 1877 and the time you purchased it a month ago?

A. I did not.

20 x-Q. Do you know where it was in the interim?

A. I do not.

21 x-Q. Who did you purchase it of?

A. John Stewart. He is a second-hand sewing machine and plaiting machine dealer in Canal street near South Fifth avenue.

22 x-Q. Do you know who built this machine?

A. Not of my own knowledge.

23 x-Q. What is your best knowledge and belief on the subject as to who built it?

A. Mr. William Walker.

24 x-Q. Did Walker have a patent on it, do you know?

A. I do not know.

25 x-Q. Ever know of more than one of these machines being in existence?

A. There were two others that made straight plaits on the same principle as that along with that machine.

26 x-Q. You mean when you bought it?

A. In 1876 and 1877 when I saw them.

27 x-Q. This then is the only bias side plaiter that you have ever seen?

A. No; I have seen some since then.

28 x-Q. Of this same kind?

A. They were attached to the sewing machine.

29 x-Q. Did you ever operate this machine?

A. Very little.

30 x-Q. You understand its construction and operation?

A. I do.

31 x-Q. What is the object of the upright ridges operated by a cam movement in the underpart of the machine ?

A. To feed the goods through after they are plaited.

32 x-Q. With the exception of the roller plaiters is this the only other side plaiter you have ever seen disconnected from a sewing mechanism ?

A. It is, with the exception of the two others that were with this.

33 x-Q. And the two you saw with this were straight plaiters and not bias plaiters ?

A. Yes, sir; operated on the same principle as this.

34 x-Q. Do you know whether or not this exhibit is used with heat ?

A. It can be and usually is.

RE-DIRECT EXAMINATION BY MR. LEE :

35 Re-d. Q. In what condition was the machine before us as to cleanliness when you purchased it a few weeks ago ?

A. It was very dusty and dirty and some rusty.

36 Re-d. Q. Who cleaned it up so as to make it appear as it now does ?

A. I did.

37 Re-d. Q. Did you use this machine to make side plaitings on while in your possession ?

A. Very little.

38 Re-d. Q. Why did you not use it ?

A. The parties who purchased the machines in connection with it failed to carry out some of their agreements and the business did not go on so that we didn't have use for that machine in that time.

Adjourned to Tuesday, January 5th, at 11 A. M.

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NEW YORK, January 9th, 1892.

Met pursuant to adjournment.

Present—B. F. LEE, ESQ., counsel for complainants ; EDMUND WETMORE, ESQ., counsel for defendants.

GEORGE H. WOOSTER, recalled as a witness on behalf of the complainant, deposes and says as follows :

EXAMINATION BY B. F. LEE, ESQ. :

1 Q. Have you heretofore been examined as a witness in this cause ?

A. I have.

2 Q. Has the nature of your business been such as to enable you to judge accurately as to the quality of plaitings ?

A. It has.

3 Q. Will you please look at the samples of plaitings marked "Defendants' Exhibit Smith's Samples of Ruffles, March 4th, 1890, G. F. Betts, Special Master," and state your opinion as to their quality ?

A. I have particularly examined the samples referred to, and find in them irregular plaits, irregular spaces, the lines of the plaits not running square across the goods, and, as far as merchantable plaitings is concerned, I consider them quite worthless.

4 Q. Would plaitings of the qualities shown in the exhibits just referred to have been fit to use at any time between 1873 and 1879 as trimmings for ladies' suits ?

A. They would not, and plaitings of that kind placed upon a lady's garment would have detracted more from its value than it would have added. In fact, such plaitings placed upon a lady's garment would have caused it to look second-hand. I would like to explain to the Master how a plait should be folded, and refer to exhibit " Tuttle *v.* Claffin, December 23, 1891," being the pamphlet or illustrated catalogue of the standard trimmings, 1872, with special exhibit marks thereon on pages 19, 14, 15. I refer to pages 17, 16 and 15, to samples of plaiting exhibited there, to show the difference between merchantable plaitings and the Smith exhibits referred to. 256

5 Q. Are you acquainted with the general nature of the business that was carried on by H. B. Claflin & Co., in the City of New York, in ladies' suits during the years 1873 to 1879 inclusive ?

A. I am ; I visited their place a great number of times ; saw their styles.

6 Q. Was their business a small one or an extensive one in those years ?

A. I considered that they were as large manufacturers in that line as there was in the city, and they did an extensive business.

7 Q. Have you had such an experience in business as to enable you to know the trade requirements of those concerns which during the years last mentioned made ladies' garments upon which trimmings were placed—such as plaitings ?

A. I have had, and during those years I was peculiarly situated, having various patents, some of which were infringed by the suit manufacturers, and I was constantly in and out of their factories and places of business, and knew well their requirements.

8 Q. Was your business such as to cause you to be informed in regard to fashions that prevailed in respect to trimmings for ladies' garments ?

A. It was, specially so.

9 Q. State whether or not, during the years last mentioned, plaitings were fashionable for ornamenting ladies' garments, and particularly ladies' suits ?

A. They were.

10 Q. While plaitings were the predominant fashion for trimming ladies' suits, state whether or not it would have been practicable for a manufacturer doing an extensive business in turning out ladies' suits for sale to dispense with the use of plaitings and to substitute other forms or methods of ornamentation if he expected to keep up a profitable trade ?

A. I do not think it would have been either practicable or profitable, during those years, for any manufacturer of ladies' suits to have dispensed with the line of goods trimmed with plait- 257

ings. A manufacturer or jobber must have a full line of goods to do a profitable trade; and, where one particular style is the rage or fashion, my experience has taught me that it cannot be dispensed with.

11 Q. Suppose two kinds of ornamentation for garments such as ladies' suits to be in fashion simultaneously, could a manufacturer doing an extensive business in making such garments for sale safely dispense with one of them and use only the other?

A. In my opinion he could not.

12 Q. Please explain the reason for the last statement.

A. A merchant buyer in going into a place of business will ordinarily say: "Have you got anything new?" That is his first want. Then he will say, "I want to see your line of such and such goods," mentioning those that are fashionable and in quick demand. If a dealer says, "I have none of those styles; I am all sold out and ordered ahead, but I've got a full stock here of something else," mentioning goods that are not so desirable, although the customer may want some of those very goods, still he will say, "No; I won't buy here; I will go where I will get a full line, and especially the kind of goods that are running now."

13 Q. If two styles are running parallel with each other so that the customer would naturally desire some of that particular class of goods of each style, would he prefer to buy at two separate places or at one establishment that kept a full line of goods, embracing both styles?

A. He naturally would prefer to purchase his full line in one place, and that would be also to his interest, because the larger a bill a man makes in his purchase, the cheaper he can get the goods, because a man would get an extra five per cent. or ten per cent. off of a $1,000 purchase where he would have to pay net prices for a $100 or $200 purchase.

14 Q. Will you please look at "Plaintiff's Exhibit Bias Side Plaiter, December 23, 1891, G. F. B., Special Master," and state what you know about that identical machine?

A. That is a machine made by William Walker for me about the year 1870. We used it in my business until the 1st of January, 1873, when I went out of active business myself and was special partner in the firm of J. V. Rockwell, and this machine was used in that business until the first of January, I think, 1875, when it was sold, with all the other machinery connected with the business, to Rockwell & Barnum. I took a mortgage back on the machinery as security for the payment. That firm failed, and I took possession of the machinery again some time in 1876, and sold it to Weaver, Richardson & Brown. I did not see this machine again until about six weeks ago. It was stated by an expert that the kind of plaiting made by that machine could not be made, and I was requested by Mr. Lee to have a machine made to show that it could. I spoke to Mr. Brown about it. He mentioned this old machine, and said he would go around among the second-hand dealers to see if he could find it. The next day he came to me and said that Stewart, a second-hand dealer in Canal street, had the machine among other old things, and said he could buy it for so much. I gave him the

money and requested him to purchase it. He brought it to me in a very dirty condition, the iron part rusted and the brass part covered with verdigris. He being a machinist, at my request, put it in the condition that it now is.

15 Q. Was this machine an experimental machine or a commercial machine?

A. A practical commercial machine.

16 Q. Will you point out in the catalogue which was put in evidence December 23, 1891, a woodcut correctly showing the product of this machine?

A. It is to be found on page 19, and it is already marked "Bias Plaited Flouncings, December 23, 1891, G. F. B., Special Master."

17 Q. Do you know of other machines of the same construction?

A. I had, in my business, of the same construction, five other machines, which did straight plaiting, not bias. 259

18 Q. Have you any record evidence of the existence of those machines?

A. I have; the mortgage of Rockwell & Barnum, dated January 1, 1875. I find, on looking at the paper, that the one I have here is the bill of sale to Rockwell & Barnum, and not the mortgage back. The particular machines are referred to in schedule A, referred to in the foregoing bill of sale, in these words, "Five old straight plaiting machines," "one bias plaiting machine."

19 Q. Were these machines delivered to Rockwell & Barnum by you?

A. They were.

20 Q. At what time?

A. On or about January 1, 1875. Within a day or two. Probably the next day.

21 Q. Were these straight plaiting machines, five in number, experimental machines or commercial machines?

A. They were practical, working commercial machines, on which large amounts of goods have been made.

22 Q. Please explain the operation of these machines by reference to "Plaintiff's Exhibit Bias Side Plaiter," now before you?

A. This machine has a bed-plate, upon which the goods rest; a feed to feed the material to be plaited through; a presser to hold the goods down and smooth them; a knife or crimper for plaiting the goods, and a heating apparatus. The goods are placed upon the bed-plate under the presser; the knife or crimper engages the goods and carries it forward to the feed and presser by turning the crank, which is upon the shaft immediately under the feed. If heat is required, gas is carried into the machine under the bed-plate by means of the pipe on the left hand of the machine, and can be ignited to heat the machine, if heat is required. 260

23 Q. Is there any sewing mechanism connected with these machines?

A. No.

24 Q. How long have you been connected with machines for sewing, so as to have a practical knowledge of the working of the same?

A. Since the year 1855.

25 Q. Prior to 1862 how accurate was your knowledge on this subject and how extensive your experience?

A. I was in the sewing machine business as a manufacturer part of that time, and a user of sewing machines the balance of the time, and had a knowledge of all machines then in existence.

26 Q. How old is a wheel feed in sewing machines?

A. The Singer machine was first made with a wheel feed, I remember, as far back as 1852.

27 Q. How old is a roller presser foot in a sewing machine?

A. In the neighborhood of 1860.

28 Q. In the Griffith machine, what effect would be had upon its practical working, if the upper roll were thrown out of gear or disconnected so that the lower roll alone is positively actuated?

A. It would work just as well as if the upper roll was actuated.

29 Q. Referring to the Griffith and Fanning machines, how important a feature is the device for adjusting each machine when in practical use on a large scale?

A. The feature of adjustment is important, but the time required to make an adjustment is unimportant; in two or three minutes either of them can be adjusted to different plaits. In a suit business perhaps a machine would require to be adjusted once or twice a week for different size plaits; then, again, perhaps not for a whole season, where there were two or three machines, as each machine would be adjusted for the size plait required; one for a sixteenth, one for an eighth and one for a quarter-inch plait.

30 Q. Assume that the means of adjustment shown in the Crosby & Kellogg Patent in suit are less convenient, and admit of a slower adjustment than the corresponding means shown in the Griffith & Fanning machines, and state how important a matter such difference would be practically, in carrying on the business on a large scale, especially a business in ladies' suits?

A. The time required for adjustment is quite an unimportant feature. If a machine was making a plait an eighth of an inch wide, and required to be a quarter or a half an inch, either of the machines inquired of could be adjusted to that change in two or three minutes.

31 Q. Are you acquainted with the machine shown in the drawing of Arnold Reissue No. 6159, which is in evidence in this cause?

A. I am.

34 Q. State whether the machine shown in said drawing is capable of making plaitings?

A. It is not. It is, distinctly, a gathering or puckering machine.

33 Q. Mention has been made in the evidence in this cause of Pipo Reissue, and it has been put in evidence by the defendants and certain suits brought thereon, and an injunction issued thereunder have been referred to in the evidence; what was the ultimate fate of the suits which were carried through to final hearing on said patents?

A. They were dismissed, Judge BLATCHFORD ruling virtually that the Pipo Patent was worthless on account of the reissue decisions by the Supreme Court of the United States.

CROSS-EXAMINATION BY MR. WETMORE:

30 x-Q. What, roughly speaking, in dollars and cents, was the amount of business of H. B. Claflin & Co., in the City of New York, in ladies' suits, during the years 1873 to 1879 inclusive?

A. I cannot state; I only know of the volume of their business by the appearance of their salesroom, and their demand for folding guides and the appearance of their factory, number of hands employed and space occupied.

31 x-Q. From the data you have just mentioned, can you tell within $500,000 what the business of H. B. Claflin & Co. was in dollars and cents during the years from 1873 to 1879 inclusive, and without reference to the testimony of Mr. Smith, and the books already in evidence in this case?

A. I could only form an opinion from the evidence that I have spoken of.

32 x-Q. Mention any manufacturer in New York who did approximately the same amount of business of the same sort during the same period?

A. Well, I thought D. B. Babcock & Co. did about a similar size business.

33 x-Q. Can you mention any other besides Babcock & Co., who did about the same business?

A. Perhaps A. T. Stewart & Co.

34 x-Q. Any other?

A. I won't attempt to state, not having any insight into the books, sales or receipts of any concern, what their business was. In my direct examination I merely referred to the appearances; that I thought H. B. Claflin & Co. did about as much in that line as anybody; yet I may be mistaken. At all events, I know they had that reputation.

Mr. Wetmore moves to strike out the words "At all events, I know they had that reputation." Motion granted.

35 x-Q. Did you ever make or sell ladies' suits?

A. Not to any extent?

36 x-Q. Ever been engaged in the dry goods trade?

A. Yes, sir.

37 x-Q. When?

A. From about the year 1846 to 1850. I was not in business for myself.

MR. WETMORE: In pursuance of reserved objection defendants' counsel moves to strike out answer to question 6 as incompetent, it appearing that the witness has no knowledge on the subject and the answer is based on mere conjecture. Objection overruled. Exception.

Also questions 10, 11, 12 and 13, and answers thereto, as incompetent and immaterial, not relating to facts, but to opinions and conjectures of the witness upon matters which cannot properly be proved by opinion, and irrelevant and imaginary conversations.

Objections overruled. Exception.

38 x-Q. Between the time you saw the Exhibit Bias Plaiter, when you sold it to Weaver, Richardson & Brown, until you saw it about six weeks ago, do you remember whether or not said machine was in use ?

A. I do not.

39 x-Q. With the exception of this particular machine have you known any other of the same kind—bias plaiter. I mean a machine for bias plaiting like the exhibit ?

A. That is the only machine I have seen for bias plaiting exactly like that.

40 x-Q. What have become of the five straight plating machines to which you refer ?

A. I do not know ; I have never seen them since the delivery of machinery to Weaver, Richardson & Brown, and I do not know that the whole five were delivered to them ; but they were delivered to Rockwell & Barnum.

41 x-Q. When was the last occasion that you knew of any of them being used ?

A. Previous to January 1st, 1875, when the business was done in the name of J. V. Rockwell.

42 x-Q. Do you know any other specimens of said straight plaiters except the five that you have mentioned ?

A. No ; the five straight plaiters and this bias plaiter are the only machines I know of having been made exactly in that way, with heavy pressure foot and gas attachment. But I have heard of others.

Mr. Wetmore moves to strike out the latter part of the answer as hearsay. Motion granted.

264 43 x-Q. Can you plait all kinds of material including alpacas on the side plaiter in evidence ?

A. All kinds of plaitings used for suits can be plaited upon that machine, except, perhaps, very thin unfinished silks without dressing, it might be difficult to plait—I don't know ; they are difficult to plait on any machine.

44 x-Q. Have you ever seen plaited on the bias plaiter all kinds of worsted and woolen materials that are used in suits ?

A. No, sir.

45 x-Q. What worsted or woolen materials have you ever seen plaited on the machine ?

A. Only alpacas.

46 x-Q. Have you seen alpaca bias plaitings made on the exhibit ?

A. I won't be positive whether they were on the bias machine or not ; I give you my impression only.

47 x-Q. What is the width of the widest plaiting that can be practically made on said bias plaiter ?

A. The width of the gauge into which the goods enters ; I think it is about four inches.

48 x-Q. What woolen or worsted goods did you ever see plaited on the straight plaiters to which you refer ?

A. Alpacas only.

49 x-Q. And what was the extreme width in inches of the plaiting that could be made on those machines?

A. If I remember correctly the straight plaiters were made for the widest number to be about the same width as the bias plaiter, about four inches.

50 x-Q. Who designed the five straight plaiters and the bias plaiter in evidence?

A. William Walker designed and made them.

51 x-Q. Do you know whether or not William Walker ever took out a patent on them?

A. I don't think he did.

52 x-Q. You don't know whether he did or not?

A. I had a contract with Mr. Walker for all his inventions made and patented while in my employ, I to pay the expenses of obtaining patents. No application was ever made for a patent on these machines, to my knowledge. I should have known it, I think, if there had been.

53 x-Q. What experience have you had as a practical mechanic in the construction and operation of machinery?

A. I am not a practical mechanic, but have been connected with the manufacture of machinery, more or less, during the years from 1856 to 1875. In 1856 I had a large sewing machine factory in Bristol, Connecticut, in which we turned out 200 or 300 machines a day, and during the years when I was in the plaiting and ruffling business, the machinery used in the factory was made principally in our own building. Oftentimes new styles, from my suggestions—notably the Walker box-plaiting device.

54 x-Q. Did you ever run the Griffith machine with the upper roll thrown out of gear, or disconnected, so that the lower roll alone is positively actuated?

A. Yes, sir.

55 x-Q. When?

A. About six months ago.

56 x-Q. For the purpose of an experiment?

A. For the purposes of ascertaining facts.

57 x-Q. That is to say, you experimented to ascertain a fact?

A. Mr. Griffiths was here, and the question arose, propounded by Mr. Lee, whether it was necessary to actuate the upper roll positively or not. Mr. Griffiths said it was not, and he disconnected the upper roll, and we ran it to prove the fact.

Adjourned to Monday, January 11th, 1892.

NEW YORK, January 11th, 1892.

Met pursuant to adjournment.

Present—B. F. LEE, counsel for complainants; EDMUND WETMORE, counsel for defendants.

CROSS-EXAMINATION OF GEORGE H. WOOSTER, CONTINUED BY MR. WETMORE:

The witness says: I wish to correct a statement made on Saturday concerning the manufacture of alpaca plaitings upon the straight

machine. On talking the matter over with the one who superintended our factory, I am satisfied that alpacas were not plaited upon either the bias machines or the straight machines referred to in my examination. All the alpacas that were made into plaitings I think were made on what we call the reversed plaiting machine.

58 x-Q. What year did Judge Blatchford reverse the decision on the motion for a preliminary injunction in the Pipo case?

A. You mean in that Thornton matter, Thornton and Singer matter?

59 x-Q. I mean, do you remember what year it was that Judge Blatchford, in consequence of the decision of the Supreme Court in Miller *v.* The Bridgeport Brass Company, held that the Pipo litigation, which had formerly been maintained in this Circuit, could not be maintained, and dismissed one or more suits which had been brought under it. What is the date so far as you remember, or the year, in which Judge Blatchford gave such decision in respect to the Pipo patent in any suit?

A. The summer or fall of 1884, I think.

60 x-Q. What, if you know, was the cost of building the side plaiters and straight plaiters referred to in your direct testimony, compared with the cost of building the roller-plaiter machines like the exhibits in this case—I mean bias plaiters and straight plaiters?

A. I should think the bias plaiter would cost more than a roller plaiter made by Griffith, but the straight plaiters I should think would cost about the same.

61 x-Q. Did you, or any one else to your knowledge, pay a license fee for the use of said five straight plaiters and the bias plaiter to the owners of the Crosby and Kellogg patent in suit?

A. Not directly.

62 x-Q. How did Mr. Griffith disconnect the upper roll when he was here, in the exhibit already referred to?

A. He loosened the gear on the shaft of the upper roller.

64 x-Q. Is that all he did?

A. Yes, sir.

65 x-Q. How did you then operate the machine to feed?

A. Turned the crank of the fly-wheel, and that operated the machine, actuating every part except the upper roller.

66 x-Q. What work did you do on the machine thus in this condition?

A. We ran through paper.

67 x-Q. Is that all you did to test it?

A. I think we had some Victoria lawn here. I won't be positive about that.

68 x-Q. Have you any of the plaitings made on that machine in that condition?

A. Not at present; they were not saved.

69 x-Q. How much did you make?

A. We ran through several pieces of letter-heads or legal cap sufficient to show that it was not necessary to actuate the upper roll.

70 x-Q. Is the occasion you have now described the only one upon which you have seen the machine actually operated with the upper roll disconnected?

A. Yes, sir.

71 x-Q. Do you know how many roller machines Babcock & Co. had in their place at any one time?

A. Babcock & Co. had two factories, one in Brooklyn and one in New York. I do not know how many they had at any one time.

72 x-Q. Do you know how many A. T. Stewart had at any one time?

A. My impression is that they had three or four. I was in their factory and saw them, but it was a good many years ago, and I wouldn't undertake to be positive.

RE-DIRECT EXAMINATION by Mr. Lee:

73 Re-d. Q. Speaking of the use of alpaca upon the bias plaiter and the five straight plaiters, of which you have spoken, was there any reason why such machines should not be used to plait alpacas?

A. None whatever.

74 Re-d. Q. In respect to the class of work that could be done, how did those six machines compare with the Griffith and Fanning machines used by the defendant, leaving out of account, of course, the peculiar features of the bias plaiter, which enabled it to do bias plaiting?

A. They would do the same class of work as the roller plaiters.

77 Re-d. Q. Were they efficient to do perfect work rapidly?

A. They were.

78 Re-d. Q. In your answer to cross-question 47 you spoke of the width of goods which the bias plaiter and straight plaiters were respectively adapted to make, was there any reason why they could not have been made for goods of greater width?

Objected to, as the question is one purely of mechanical expert knowledge, which the witness has expressly disclaimed.

A. They could have been made for goods of greater width.

79 Re-d. Q. Why are roller side plaiters made of the width shown in the Griffith and Fanning machines in evidence, and as some of the witnesses have stated, of even greater width?

A. Ordinarily to run two or three pieces through at the same time.

80 Re-d. Q. Who is the Griffith spoken of in answer to cross-question 57, who worked the Griffith machines here in evidence without actuating the upper roll positively?

A. J. G. Griffith, maker of the Griffith exhibit in evidence.

81 Re-d. Q. When Griffith and you ran the legal cap paper through the machine, how good a test was it as to its capacity for plaiting?

A. A very excellent test because paper having a smooth surface is more difficult to plait than almost any other substance.

82 Re-d. Q. Do you know any reason why the plaiting machines that you refer to as the five straight plaiters were not patented on your or on Walker's behalf?

A. Because I did not think there was anything patentable about them, they merely being an enlarged edition of the Crosby & Kellogg

machine, with the sewing mechanism left off and gas for heating added.

83 Re-d. Q. Was it well known at the time of the Crosby & Kellogg Patent that cloth could be better creased or flattened down or folded by hot metal than by cold metal?

A. I suppose that has always been known ever since woman wielded a flat iron.

RE-CROSS EXAMINATION by Mr. Wetmore:

84 Re-x-Q. Do you know whether or not the J. G. Griffith to whom you have referred has been released and discharged by the owners of the Crosby and Kellogg Patent from any claim of infringement arising out of his having made and sold roller plaiting machines, including the exhibit in suit?

Objected to as irrelevant and incompetent and as not cross-examination.

A. I do not know it. I never heard of it.

85 Re-x-Q. Do you wish to be understood as testifying that with three of the five straight-plaiter machines, which have disappeared, the defendants herein could have done all the work which it has been testified they did on the roller-plaiter exhibits in the same time upon the same material and at the same expense?

A. I wish to be understood as testifying that with three of the machines like the straight plaiters I have mentioned, made to plait goods six inches wide, which I understand was the limit of the width manufactured by the defendants, the defendants could have manufactured during the period in which they made plaitings—have manufactured all they return as having made and a great many thousands of yards more. In running through one piece of goods at a time they could have done it at the same time and at the same expense.

86 Re-x-Q. Suppose it was desired to make as much four-inch alpaca plaitings in an hour as possible, and one of the roller-plaiters in evidence was run for that purpose to its full capacity, do you say that, upon one of the straight plaiters to which you have referred, you could produce an equal amount of alpaca plaiting in the same time?

A. It is a mere question of width. The straight plaiters to which I have referred that we had, which plaited goods about four inches wide, had but one knife or blade; the Griffith machine, I believe, has 44 different knives. If, therefore, a machine like the straight plaiters I have referred to was made wide enough, it would make just as many strips of alpaca plaiting as the roller plaiters marked "Griffith and Fanning Exhibits."

87 Re-x-Q. I do not ask about the straight plaiters as they might have been made, but as they actually existed?

A. The straight plaiters as they actually existed would only do one strip about four inches wide; they were only intended to work that way.

88 Re-x-Q. Then, as they actually existed, and as compared with

the roller-plaiter exhibits as they actually exist, the roller plaiters could do double the amount of four-inch plaiting in an hour that could be done on the straight plaiters, is not that so?

A. No; the roller plaiters that exist many of them are four to six inches wide, intended to do one strip at a time, notably the J. H. Brown machine now present

89 Re-x-Q. I ask nothing about roller-plaiting machines except the exhibits by which—I meant the Griffith and Fanning Exhibit here present on the table. Please answer the question as to those?

A. As I said before, the Griffith machine was manufactured expressly wide, so that two or three strips could be run through at the same time. Consequently, it would do double the work that the straight plaiters I have referred to would, they being manufactured only for one strip. But I doubt very much if the Fanning machine is capable of plaiting more than one strip at a time.

The machine referred to by the witness in Re-x-Q. 88 is marked "Defendants' Exhibit Brown's Small Machine, Mch. 31, 1891, G. F. B., Special Master."

GEO. H. WOOSTER.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, as Trustee of the Elm City Company,
AGAINST
JOHN C. CLAFLIN, as Executor of Horace B. Claflin, and others.

NEW YORK, January 30th, 1892.

Met pursuant to adjournment.

Present—Counsel as before.

Witness GEORGE H. WOOSTER, desires to make a correction in his testimony, as follows:

When I spoke of the Griffith machine being operated with the upper roll disconnected so as to leave it free, I made a mistake; I should have said lower roll instead of upper roll. My testimony would have been correct if I had spoken of the Fanning machine instead of the Griffith machine.

HENRY L. BREVOORT, a witness on behalf of the complainant, being recalled, deposes and says as follows:

1 Q. Have you been heretofore examined as a witness in this case?

A. Yes.

Counsel for complainant offers in evidence a certified copy of letters patent granted to George B. Arnold, May 8, 1860, No. 28,139 for Improvement in Sewing Machines, and the same is marked "Complainant's Exhibit Arnold Original Patent."

Also a certified copy of the disclaimer filed May 7th, 1874, in the matter of letters patent granted George B. Arnold May 8, 1860, No. 28,139, for Improvement in Sewing Machines, and the same is marked "Complainant's Exhibit Arnold Disclaimer."

Also a certified copy of the letters patent granted John A. Pipo and John S. Sherwood January 27th, 1863, No. 37,550, for Improvement in Machines for Making Ruffles, &c., and the same is marked "Complainant's Exhibit Pipo & Sherwood Original Patent."

Also the decision of the Circuit Court of the United States for the Southern District of New York made by Mr. Justice BLATCHFORD July 22d, 1884, reported in 22 Blatchford's Circuit Court Reports, pages 307 to 332, inclusive.

2 Q. Have you read, and do you understand, the original Arnold Patent, and the disclaimer referring to the same, just offered in 273 evidence and also the reissue of said Patent No. 6159, heretofore offered in evidence by the defendants?

A. I answer yes to all portions of the question.

3 Q. Mr. Hicks has stated in his deposition, in reference to the first claim of said Arnold Reissue, that he thought that the defendants' Griffith and Fanning machines infringed said claim substantially, but not just as described, and that in the broad interpretation of the claim they did. And he also refers to other claims of the said Arnold Reissue which he thinks are infringed by said Griffith and Fanning machines. Will you please consider the original and reissued Arnold Patent and the disclaimer, and give your opinion upon this general subject?

A. I will do so, as the matter is called for in the question. Referring to the Arnold Reissue, I have no doubt but that the words used in the claims thereof are sufficiently comprehensive to include and describe the machines of the defendants. I refer more especially to the first claim, the second claim, and perhaps the fourth and sixth claims. It is unnecessary to go into this matter with any great particularity. Turning to the Arnold Original patent, dated May 8th, 1860, I find that the specification has three claims, but I do not know that it is necessary to specially refer to the third claim, as the said third claim is disclaimed by a disclaimer filed May 7th, 1874. This leaves only the first and second claims open for consideration. The second claim is a specific claim referring to the two four-motion feeds shown and described in the Arnold Patent for making the gathers which the patent describes. The first claim refers to a gathering and feeding mechanism in two distinct parts, and so constructed and operated that the gathering mechanism moves the material to be gathered up the needle of the sewing machine, and leaves it immediately after the stitch is formed, or at the point where the said stitch is formed, and a feeder, which takes hold of the cloth and feeds it after the seam is made therein by the sewing mechanism. Clearly, this claim refers to mechanism such as is described in the patent, which is adapted to the formation 274 of such folds and gathers in a strip of cloth as necessarily require the act of sewing to preserve the work performed by the gathering mechanism. Thus, in my judgment, the claim is limited to practically two four-motion feeds combined with a sewing machine, the function of which latter is to make permanent those little gathers which the gathering machine forms in the strip of goods being operated upon. I do not find in either of the defendants' machines

any sewing mechanism which would enable such gathers as the Arnold machine is capable of making of being preserved or passed through the machine in their completed form. The defendants' machines are for making distinct and well-defined plaits formed by the operation of a blade capable of entering the plait and folding it to an edge in connection with a holding mechanism operating in conjunction with a suitable surface below to hold the goods in front of the blade so that the plaits can be folded to an edge. I do not think that either of the defendants' machines contain the inventions pointed out in the first and second claims of the Arnold Original Patent. I have said that certain of the claims of the reissued patent of Arnold might, if they were broadly understood, include the mechanisms used by the defendant in this case, and this statement I believe to be correct. However, if the claims of the said reissue are to be understood as for the same invention or inventions as are claimed in the original patent, then, of course, the said reissue claims would not embrace the mechanism of the defendants. The only view which can be taken, and which will bring the defendants' machines within the claims of the reissued patent, also involves a broad and comprehensive understanding of such claims, and this understanding of the claims of the reissue expands them far beyond any invention or inventions which the original patent claimed, or contemplated claiming.

4 Q. Please state whether or not the original Arnold patent to which you refer, contains in its specification a sufficient description to enable any person skilled in the art to which it appertains to make, construct and use the invention described therein, and to understand the principles of said machine?

A. It does. The original specification is perfectly clear, and anyone reading it can determine exactly therefrom the construction of the mechanism, and the operation of the parts described.

5 Q. State whether or not the said Arnold reissue describes and claims different inventions from those for which the said original letters patent were granted, in respect to all the claims of said reissue that can have any relation whatever to the Griffith and Fanning machines used by the defendant?

A. It does. The claims of the reissue under which the machines like those of Griffith and Fanning could be held were claims that differ materially from either the first and second claims of the original patent. The third claim of the original patent having been disclaimed, I need not consider it as it appears in the original patent. In the reissued patent the subject matter of the third claim of the original may be said to reappear in the reissue, notwithstanding the fact that it was disclaimed, but in the said reissue it appears as a substantially different invention.

6 Q. If the claims of the Arnold reissue are so narrowly construed as to limit the invention to the several combinations therein specified, substantially in the manner set forth in the specification and drawing thereof, and so as to prevent said reissue claims from being expanded claims when compared with those of the original patent, state whether or not either the Griffith or the Fanning machine used by the defendants would infringe any of said reissue claims?

A. Under the instructions of the question I do not think either of the machines could be said to infringe the patent when thus understood.

7 Q. Have you read, and do you understand, the original Pipo Patent No. 37,550, and also the reissue of said Patent No. 6565 already offered in evidence in this cause?

A. I have frequently read both the Pipo original and reissue 276 patents, and believe that I understand what is therein described and shown.

8 Q. Mr. Hicks has stated as his opinion that certain claims of the Pipo reissue were infringed by the Griffith and Fanning machines used by the defendant. Will you please consider the original and the reissue Pipo Patent and give your opinion upon this subject?

A. I have considered both patents. There are undoubtedly claims in the reissue whose terms are so comprehensive and far-reaching as to include as within their scope the machines of the defendants. I find, however, when I compare the said reissue with the original patent of Pipo that the claims of the reissue are for entirely new and different inventions from anything claimed in the said original patent. The original patent had but one claim, and this claim was limited to the combination of a sewing machine with a number of guides so arranged as to form two folds of a single piece of cloth. This claim is limited and certainly forms no legitimate basis for the broad and comprehensive claims which I find to have been added in the reissue. I need hardly add that the claim of the original patent describes mechanism which is not found in either of the defendant's machines.

9 Q. Have you read the deposition of James M. Hicks, taken in this cause, and do you understand the statements he has made in reference to the various mechanical matters about which he has testified?

A. I have read his deposition, and I think that I understand the same, and the mechanical devices to which he referred in the course of his said deposition.

10 Q. Have you examined, and do you understand the construction and mode of operation of the plaiting machines marked "Plaintiff's Exhibit Bias Side Plaiter" in this cause?

A. I have examined the said machine and I understand its construction and mode of operation.

11 Q. Will you please read question and answer 5, page 35, of the Master's minutes of the deposition of Mr. Hicks, and 277 state in what respect you agree and differ upon the statements made by him in answer to said question?

A. The question referred to calls for a statement of the function of the sewing mechanism of the Crosby & Kellogg Patent, and inquires as to the effect of omitting such sewing mechanism from the Crosby & Kellogg machine (the Master's minutes are in error clearly where they use the word "united," which should be "omitted").

In the answer the witness Mr. Hicks states that the purpose of the sewing mechanism is to fasten what he calls the frills after they have been formed. He further states, and so far as I can see, with-

out reason that if the sewing mechanism was omitted, necessarily the presser foot would also be omitted. He then further states that, even if the presser foot was retained, no plaiting could be produced which would retain its shape after passing under the presser foot and between it and the table. Now, as a matter of fact, the omitting of the sewing mechanism would not necessarily be followed also by the omission of the presser foot which is a device as necessary to the formation of the plait as it is to the formation of the stitches, and which mechanism would be retained so long as the plait-forming mechanism was itself retained. I further disagree with Mr. Hicks and I think that the plaits could be retained in their formed condition and could be fed under the presser foot and between the presser foot and the table, even though the sewing mechanism was omitted from the machine.

12 Q. Have you read and do you understand the evidence of Alexander E. Kursheedt, especially in reference to the machine "Plaintiff's Exhibit Bias-Side Plaiter, December 23d, '91," and the goods made by such machine, including the woodcuts marked as exhibits herein in connection with his evidence and illustrating the products of such machine, and also the testimony of George H. Wooster in reference to machines like the exhibit, and also to other similarly constructed machines differing from the exhibit in that they did straight work instead of bias work?

A. I have read the testimony referred to and have examined the exhibits, and understand what they show and describe.

13 Q. Can you illustrate more fully the matters spoken of your answer to Q. 11 by referring to said machines and exhibits?

A. I can. The machine, and the testimony relating thereto and describing the machines for doing straight side-plaiting, may all be considered together, as both kinds of machines, though adapted for different styles of work, are substantially the same mechanical structures, as I understand the matter from the testimony. These side-plaiting machines are, in effect, Crosby & Kellogg machines without the stitching mechanism, and with a rough-service feed added thereto. The side-plaiters have blades which take hold of the cloth and fold or plait it to an edge, and a presser foot which holds the cloth against the action of the crimper blade, and under the presser foot the cloth, properly crimped, is finally fed between the said presser foot and the cloth-plate, partly by the action of the crimper blade, and partly by the action of the four-motion feed. This exhibit bias side plaiter clearly shows that a strip of goods can be crimped and can be fed under a presser foot held down by a strong spring, and between such presser foot and the cloth-plate, being so fed partly by the blade which formed the crimp, and partly by a rough-service feed, without disturbing or in otherwise injuring the crimps, and without the necessity of employing any sewing mechanism or other device of like nature. The machine clearly demonstrates that Mr. Hicks is in error when he says that the mechanism of Crosby & Kellogg cannot be employed or cannot be usefully employed unless it is combined with a sewing mechanism.

14 Q. Please explain the office of a feeding mechanism in ma-

chines generally, and especially of such as are under discussion in this case?

279 A. Feeding mechanisms generally are employed in machines for the purpose which their name implies, that is, to feed or cause to move along some object or device which is to act or be acted upon in successively different positions, thus a tool is fed along a piece of work so that it may act successively on different portions of the work. A feeding mechanism is used to feed a saw into a log so that it may act upon the newly cut surfaces successively as the saw makes its stroke or revolutions. In a sewing machine a feed is used to pass the material under the needle so that the needle may puncture a series of holes in succession in the article fed and carry through the holes the threads which are to do the sewing. Thus in the Crosby & Kellogg machine the feeding took place for the purpose of giving fresh material for the needle to act upon and for the additional purpose of carrying the completed plaits through the machine and under the presser foot. It is necessary in a plaiting machine when one plait is made, that it should be fed forward and furnish space for the formation of the succeeding plait, and so on so long as there is material to be acted upon by the plaiting and feeding instrumentality.

15 Q. Will you illustrate the office of feeding mechanism in connection with the second claim of the Crosby & Kellogg patent as construed by the Court?

A. The only function or object of feeding the goods so far as the invention of the second claim is concerned, is to remove by feeding the completed plait from out of the way of the plait next to be formed. A succession of plaits formed by such a mechanism requires that the plait as formed shall be carried away from the plait-forming mechanism as the said plaits are made, and this is the only function that the feeding operation has to perform so far as the successive operation of the devices set forth in the second claim are concerned. The claim itself says nothing about feed, and does not involve any feeding operation as a portion of the claim, and the devices referred to in the claim would go and perform their function whether the goods were fed out of the machine or were gotten out of the way by any method, it not being material to the invention of the claim how or when or whether the goods be fed, in the ordinary meaning of that term, or whether they be disposed of in any other way.

280 NEW YORK, February 6, 1892, 11:30 A. M.

Met pursuant to adjournment.

Present—Counsel as before.

16 Q. Referring to questions 8, 9 and 10, and also to question 11, of Mr. Hicks' deposition, and the answers thereto, and state your views upon the topics there treated of by Mr. Hicks?

A. The portions of Mr. Hicks' testimony to which the question refers me relate to the feeding device for feeding the material after the plaits are made. In machines of this class, or of any class which are intended for the formation of plaits in a strip of goods, some

mechanism must be arranged for discharging or feeding the plaits from the machine as they are formed, as in all the mechanisms which produce a product some means must be employed to feed the product when produced from the machine. In the Crosby & Kellogg Patent the formed plaits were discharged by the action of the knife, aided, if necessary, by a rough-surface feed. In various classes of mechanism roller feeds, ratchets and pawl feeds and the like were known. So far as the inventions here under discussion are concerned, it is immaterial thereto how the feeding is accomplished, as the claims in no wise relate to the feeding mechanism ; however, so far as the purpose and object of the manufacture is concerned, it is wholly immaterial whether one form or another form of feed be used for removing the completed plaits, and the roller form is as well known and is as common a form of feeding mechanism for various mechanical purposes as is the four-motion feed or the old wheel-feed of a sewing machine. I think it is clear that the inventions of the patent in suit can be as well used in a machine having rollers to remove the product as in a machine having some other form of feed to remove the product, and so far as the inventions themselves are concerned, it is immaterial to them which form of feed is used, so long as the feed will remove the completed plaits, giving the plaiting instrumentality a chance to operate after the previously formed plait has been carried out past the knife. The exhibit marked "Bias-Side Plaiter, Dec. 23d, 1891," is a complete refutation of any statement or theory that a four-motion rough-surface feed would pull out, during the feeding operation, the previously formed plate, for in this machine the plaits are fed under a long presser foot pressed on by a heavy spring, the feeding device being a four-motion feed rising and falling above and below the cloth-plate, the said feed carrying the plaits along without disturbing them so far as their formation is concerned, and acting in this regard as would a pair of rolls rotated together and presenting a moving surface on both sides of the formed plait. I understand that the bias form of plaiter was only one form of device which was employed, and that straight plaiters of the same construction were used which operate in the same way and which produce the same result.

16 Q. Please refer to question 12 of Mr. Hicks' deposition and answer thereto, and express your views upon the subject there treated of ?

Mr. Hicks says that a machine built in accordance with the Crosby & Kellogg Patent, and provided with a presser foot, could not be built and operated so as to perform efficient work on goods as wide as those which could be operated upon by the machines of the defendants. He gives no reason for this statement, but merely states his opinion. I think that the exhibit "Bias Plaiter" is a complete answer to any such opinion on his part, for it is evident that with machines constructed as is the bias plaiter, which closely follows the Crosby & Kellogg mechanism, that strips of goods of any width could be successfully plaited.

17 Q. Please refer to questions 14 to 17 of Mr. Hicks' deposition

and the answers thereto and express your views upon the subject there treated of?

A. The questions referred to of Mr. Hicks relate to the adjustability of the blade for increasing and decreasing the amount of material which is to be taken up in the formation of each plait. Mr. Hicks states that both of the defendants' machines have this adjustability, and then he states that in the Crosby & Kellogg Patent the mechanism which he has described as in the defendants' machine is not in the Crosby & Kellogg machine. I do not see that this statement is relevant or that it has any force. I admit that the Crosby & Kellogg Patent does not show or describe the mechanism which Mr. Hicks says he finds in the defendants' machines. The point of importance, however, is that, in the Crosby & Kellogg Patent, the movement of the blade is described and shown as capable of being varied for the identical purpose served by the adjustment of the blades of the defendants' machines; that is to say, for increasing or decreasing the amount of material taken by the blade in the formation of each separate plait. To put the matter briefly, both of the defendants' machines, and also the Crosby & Kellogg Patent, contain mechanism for adjusting the movement of the plaiter blade, so that the amount of material, or, in other words, the size of each plait, may be thus varied to suit the particular formation of goods being made. Mr. Hicks is careful not to call the attention of the Master to this striking feature of similarity.

18 Q. Please refer to question 21 of Mr. Hicks' deposition and the answer thereto, and express your views upon the subject there treated of?

A. Mr. Hicks is asked to point out the relative value and importance of the Crosby & Kellogg claims here in controversy when compared with the Arnold Patent and the devices and contrivances contained in the defendants' machine, and essential for their operation. I have before in this record stated the position of the Arnold Patent, both original and reissue, and what I have said may be summarized as follows: The original Arnold Patent was specifically limited to the operation of certain parts in connection with a sewing mechanism, which parts were useless without such sewing mechanism. The reissue, if it describes the same invention as the original, may be of importance, but it does not cover the defendants' mechanism, while the reissue, so far as its broad language is concerned, though it may cover by its terms the defendants' machine, describes and covers in so doing inventions which are not found in the said original patent. I think it is clear, from a careful examination of the Crosby & Kellogg Patent, that the claims here in controversy cover the vital and important feature of the device. It was broadly new with Crosby & Kellogg to combine a holder for the goods, consisting of the presser foot or its equivalent or the cloth plate or its equivalent, and a knife which had the capacity of forming the plait by passing the doubled material over itself as it advanced towards that point in front of it where the goods were held. The second claim broadly covers this, and does not involve any sewing mechanism or anything else, but this broadly new and very comprehensive invention. This is the

subject matter of the second claim. The fourth claim is for the same subject matter, plus an additional device, which is a very advantageous and useful feature. The second claim, however, covers the broadest idea. I think that my statement, as here made, will be borne out by a reference to the opinion of his Honor Judge WALLACE in the 19th Federal Reporter, page 599, where the scope of the Crosby & Kellogg Patent is considered in this case, viz., Tuttle, Trustee, vs. Claflin. Mr. Hicks seems to think that some of the details of the defendants' devices are of more importance than anything else; thus, he thinks that the defendants' method for regulating the adjustability of the blade, etc., is of more importance than the devices which form the plaits. Why he should think so I am sure I cannot tell, and why he thought so is not stated in the record. It is clear that in the machine for forming plaits the plaiting devices are of the first importance, and the regulating devices which adjust the movement of the parts, etc., are of subsidiary importance. In fact, Mr. Hicks' perspective seems to have become inverted for the benefit of the view which he wished to take of the surrounding country, and the tree in the distance became of greater importance than the bridge which was supporting him over the stream he was attempting to cross.

19 Q. Please refer to x-Q. 21 of Mr. Hicks' deposition and the answer thereto, and express your views upon the subject there treated of?

A. Mr. Hicks, in the portion of the record referred to, is discussing the operation of the ordinary ruffling attachment used on sewing machines, which attachment is so arranged as to be capable of forming properly made ruffles or plaits in a strip of goods passed through the machine. Mr. Hicks says, in answer to x-Q. 21, that all intermittent feeding mechanisms on sewing machines act as or are spacers. He then says as follows: "In the act of forming "crimps or folds I understand the word 'spacer' to mean spacing to "regulate the width of a plait or fold." The above statement is absolutely absurd, and for the following reasons: The word "space," as used in plaited goods, refers to the distance between the folds or plaits, which distance has absolutely nothing to do with the width of the plait or fold. A "spacer" is a device which regulates, or assists in regulating, or determines what this space shall be, and the device termed a "spacer" has nothing whatsoever to do with the regulation of the width of the plait or fold. This is determined by the blade, or the plaiting instrumentality, which determines the amount of material which shall go into each fold, while the "spacer," or spacing instrumentality, determines how much material shall exist between the adjacent plait. I do not care what mechanism is employed for spacing the plaits, whether it be a four-motion feed, a pair of rolls, or a knife performing its work after the plait is finished; whatever mechanism is used as a "spacer," the operation of spacing invariably takes place after the operation of forming the plait is completed.

10 Q. Mr. Hicks makes certain statements in connection with x-Qs. 28, 37, 39 and 44 to 47 inclusive, in his deposition. Will you please state your views upon the topics that he there refers to?

A. I will. Mr. Hicks in these various questions and answers states and many times repeats these statements that the operation of a four-motion feed and a presser-foot in connection with plaits formed by a blade or knife would be, referring to the feed, to pull out or destroy the plait when the four-motion feed attempted to feed the plait under the presser foot. I have often heard people make this same statement, and it generally arises from the fact that they do not consider the real position and condition of the plait between the feed and the presser foot. If the true position of the plait is taken into consideration as it lies between the presser foot and the feed, it will be at once seen that the feeding operation, if it tended to disarrange the plait, would merely increase its size in contradistinction to pulling it out. There is no use in going into a lengthy discussion of this question because facts are a great deal better than theories or explanations, and the fact is that a four-motion feed will feed the plaits along under a presser foot without disarranging them and without pulling them out, and this is proved by the "Complainant's Exhibit Bias-side Plaiter." This exhibit is worth any amount of theory, and I leave the matter, feeling that the machine is better proof than any statement or supposition by me.

21 Q. Mr. Hicks makes certain statements in connection with Re-d. Questions 1 and 2 in his deposition. Will you please state your views upon the topics that he there refers to?

A. Mr. Hicks' statements in the questions referred to amount to this. In his opinion the Crosby & Kellogg machine could not be made to do the work which the defendant's machines are capable of performing. No one contends for a moment that the machines of the patent could do the work of the defendant's machines looked at in a literal sense, for the Crosby and Kellogg Patents show machines, and the defendant's machine is a big machine; but there is nothing to prevent a person taking the patent and making therefrom a big machine literally as shown in the patent, and after the machine was made there was nothing to prevent such machine from doing the work that the defendant's machines are capable of doing. If the sewing mechanism is left off as a securing means, heat could be applied as a partial securing means, and as is shown to be possible in the case of the bias-side plaiter. I do not mean to say that such a big Crosby & Kellogg machine would be as handy a piece of mechanism as one of the defendant's machines, because it would have more parts; the defendant's machines having been built on the Crosby & Kellogg principle, and embodying the Crosby & Kellogg invention, as expressed in the second and fourth claims, and all parts not necessary for the plaiting devices have been eliminated. Now if the same thing is done to the Crosby & Kellogg machine, a mechanism of substantially the same simplicity will result; and, as the bias plaiter shows, such a machine is only a question of degree, and one could be made of any desired size, and could be constructed to accomplish any desired result.

22 Q. Please refer to Re-d. Questions 12 and 13 of Mr. Hicks' deposition, and state your views of the matters of which he treats in his answers thereto?

A. The questions and answers of Mr. Hicks, to which my attention is called, refer to the use in the Crosby & Kellogg machine of a feed to assist in the feeding of the goods between the period when the crimper is acting to form the crimps therein. I do not know why Mr. Hicks should wish to in any way eliminate a feed from the Crosby & Kellogg Patent. As a matter of fact, the Crosby & Kellogg Patent, I may say, abounds in feeds. The knife is described as capable of acting as a feed; a rough surface feed is described, and a weight to assist the feed is described, which weight may be used at times to assist the feed in moving the goods under a presser foot. I merely call attention to the fact that the patent thus in many places refers to feed, and is suggestive throughout of the use of a feed of some kind, and further, I might add, any mechanic would know enough to add a feed to a mechanism for the purpose of getting rid of a finished product, such as are the plaits or folds formed by the Crosby & Kellogg mechanism.

23 Q. Referring to the re-direct question put by Mr. Wetmore to Mr. Hicks, being the last question and answer of his deposition, please explain what is the function of the roller of the Griffith and Fanning machine, and also state what mechanism is directly involved in the second and fourth claims of the Crosby & Kellogg Patent?

A. The two rollers of the Griffith and Fanning machine perform the function of the presser foot and the cloth-plate of the Crosby & Kellogg machine, in so far as they hold the goods against the forward motion of the plaiting blade. They have the further additional function in the Griffith and Fanning machine of acting as feeders, but then it must be remembered that a rough-surface four-motion feed is really only a moving portion of the cloth-plate called into play when it is desired that the goods shall be moved along the surface of the cloth-plate, and with that portion thereof which then rises and supports the goods.

The 2d and 4th claims of the patent in suit involve only a plaiting blade and a holder consisting of an upper and an under co-acting surface, and whether that surface is a cloth-plate and a presser foot, or consists of two rollers, is immaterial. The above is said in reference to the 2d claim.

The 4th claim is practically the same invention with a spring co-added to press down the blade in advancing toward the holding mechanism, and to relieve the blade while retreating from the holding mechanism. I use the word spring, but any other equivalent mechanical device is equally suitable.

24 Q. Mr. Hicks has further referred in his deposition to a smoothing effect tending to make the plaits sharp, distinct and more or less permanent, produced by the passage of the plaited cloth between the rollers of the defendant's machines. Is such an effect produced in the mechanism described in the Crosby & Kellogg Patent?

A. It is. The plaits are ironed down and pressed upon in the Crosby & Kellogg machine, and are thus flattened and their permanency made greater. This effect can be carried out to any desired extent, and the Plaintiff's Exhibit Bias Plaiter is a fair

example of what can be done in this direction on a machine having all the actions of the Crosby and Kellogg machine when it is desired to use that machine as a device to iron or press the plaits down. I am now considering all the mechanisms regardless of any needle or stitch-forming addition.

25 Q. Mr. Hicks refers to a patent to James Orr dated November 4, 1867, sealed February 4, 1868, complete specification April 30, 1868, granted in Great Britain, and he states that what that patent described embraces mechanism substantially like the two machines spoken of as used by the defendant, the Fanning and Griffith machines? State whether you have examined a copy of said patent in evidence and marked "Defendant's Exhibit Orr Patent," and state your opinion as to what Mr. Hicks has just stated?

A. I have examined the patent referred to, being the Orr Patent mentioned in the question. I see no reason to materially disagree with Mr. Hicks. The Orr Patent does show many of the features of the defendant's machines, but so far as the plaiting blade and the holding mechanism in front of the same is concerned, I find that all these features are found in the Orr Patent substantially in the same form as the defendant's machine. The Orr Patent has two rotating rollers and a reciprocating knife, the rollers acting as a holder for the material and likewise as a feed, the knife acting as a crimper or plaiter to fold and crimp the plaits to an edge before the holding instrumentality located in front of the knife.

26 Q. Have you examined depositions of John Fish and John H. Brown, taken on behalf of the defendants in this cause, and do you understand the same?

A. I have read the depositions referred to and I understand what they refer to.

27 Q. Please state your views as to the statements made by those witnesses?

289 A. Mr. Fish criticises details of difference between the Crosby & Kellogg machine and the defendant's machines, and discusses what might happen, in his judgment, with the Crosby & Kellogg machine, but his discussion only embraces the action of the mechanism after the parts referred to in the 2d and 4th claim have performed their work. Therefore his statements do not have a material bearing on the matters here in controversy, and further, if they are considered of importance, the exhibit bias plaiter is an answer to the criticism which he makes.

As to the testimony of Mr. Brown, it mainly deals with the statement that his mechanical abilities were insufficient to enable him to construct a machine like those of the defendants even after he had become acquainted with the construction of the Crosby & Kellogg machine. This is possible, but Mr. Brown could have accomplished the result produced by the Crosby & Kellogg machine on a larger scale had he desired, and had he constructed the Crosby & Kellogg machine on a scale of sufficient magnitude for the work he desired. Mr. Brown seems to make a great point as to the use of heat as a partially sufficient securing means for holding the plaits in position without the sewing, and he dilates upon this and the use

of this heat in the defendants' machines. Certainly, the defendants or rather those who constructed the Griffith and Fanning machines did not invent or discover the beneficial effects of the ordinary flat-iron or other ironing mechanisms. Heat, and the beneficial effects of heat in machines of a kindred character, has been known and utilized for years, and any one who wished to obtain the benefits derivable from this old method could have done so without the exercise of any invention or without making any discovery whatsoever.

The bias plaiter exhibits a Crosby & Kellogg machine wherein heat is utilized, and wherein a presser foot is really a flat-iron ironing down the plaits as they are formed.

28 Q. Immediately prior to 1873, when the infringement by the defendant, which is the subject of this accounting, commenced, could there be any invention requisite in adapting the Crosby & Kellogg mechanism of the second and fourth claims of that patent to the other parts composing the Griffith and the Fanning machines used by the defendants, in view of the then state of the art, and in consideration of what was then open to the public in this country?

A. Of course not. Referring to the state of the art, I find that the English Patent of James Orr was sealed on the 4th of February, 1868. In this patent is shown two plaiting mechanisms, one a box plaiter, and the other a simple plaiter having roller feeds and a reciprocating knife or knives with heating device, etc., and adapted to do the same work as the defendants' mechanism, and being in substance the defendants' machine minus a device to increase the pressure upon the blade throughout the entire forward stroke thereof. In fact, the Orr patent shows all that is valuable in either the Griffith or the Fanning machine, and there certainly could be no invention in 1873 or 1872, or even earlier, in constructing such machines as Griffith and Fanning show.

29 Q. Suppose one should subtract from either the Griffith or the Fanning machine the elements of the second claim of the Crosby & Kellogg patent, what would be the value of the remaining parts?

A. The remaining parts would have no value, and they could be sold for old iron, as I do not know any other mechanism which could utilize these old parts. Furthermore, nothing that the art showed before the date of the Crosby & Kellogg patent could have been substituted in these machines for the knife and the holding mechanism and have accomplished the same result without involving the substantial devices of the patent as claimed in the second claim. In fact there is no known substitute to-day for these old devices of Crosby & Kellogg, and there is nothing that can be substituted for the knife and the holding mechanism and which will accomplish the same results.

30 Q. In view of all that has been disclosed by this record, whether before the Court or before the Masters, how effectual, in your opinion, was the second claim of the Crosby & Kellogg patent in securing a monopoly to the owners thereof machines intended for plaiting of the type shown in the defendants' machines, and do you know of any other patent that could have shared in interfering with

the operation of similar machines between year 1872 down to the present time?

A. The Crosby & Kellogg patent perfectly and effectually secured to the owners thereof a monopoly of that which is claimed in the second claim, and consequently this gave to the holders of the patent a monopoly of such machines as the defendants' machines in this case. From the date of the patent to to-day I know no other mechanism which could do the work in the same way, and every sewing machine to-day that has a plaiting attachment employs the invention of the Crosby & Kellogg patent as expressed in the second claim thereof. I have explained that the Arnold and Pipo Patents could not be properly construed to affect the defendant's machines.

31 Q. You have given your views as to the importance of the mechanism of the second claim of the Crosby & Kellogg patent in securing to the owners thereof an untrammeled monopoly of such machines as the Griffith & Fanning machines. Will you please explain the position of the fourth claim in reference to those same mechanisms?

A. The fourth claim also covers both of the defendants' machines, the fourth claim being, in fact, merely the second claim plus the mechanism employed to press the blade down in advancing, and which pressure was relieved on the retreat of the blade. The invention is not as important as that of the second claim, but it is nevertheless a useful and meritorious invention, and one which is employed in almost all plaiting devices and attachments in some form or by some means. A mechanism could be made without employing the invention of the fourth claim, but such mechanism would be less effective and less efficient than one in which the devices of the fourth claim were used.

NEW YORK, February 13, 1892.

Present—B. F. LEE, Esq., for complainant; EDMUND WETMORE, Esq., for defendants.

CROSS-EXAMINATION OF MR. HENRY L. BREVOORT by Mr. Wetmore:

32 x-Q. You were employed, were you not, a number of years ago, as expert in a number of different suits brought by parties claiming the Griffith & Fanning machine, here in suit, or machines substantially like them, were infringements of various United States Patents?

A. I was employed in a number of suits which, if I recollect rightly, were brought against the Griffith & Fanning machine under the Arnold reissue. Suits were also brought against the same machines under, I believe, both the Pipo and Robjohn reissue patents.

33 x-Q. When, if you remember, were you first retained in any suits relating to these roller side-plaiting machines—was the case of Urner against Dryfoos the first?

A. I do not remember the date; but Urner against Dryfoos was the first.

34 x-Q. In the course of your employment, in the suits mentioned, did you visit a number of the establishments in this city, where these roller side-plaiting machines were in operation, and make a very thorough search of the prior state of the art, both as contained in its literature and as it had been actually practiced in this city from a period anterior to the Arnold patent down to one, at least, as late as the reissue of the Pipo, or later?

A. Yes.

35 x-Q. When and where did you first see machine like Plaintiff's Exhibit Bias Side Plaiter? I mean substantially identical with that machine?

A. I never saw one until I saw the exhibit in this case. I may say that the machines I saw were those which were claimed to infringe the patent in suit—that is, in these old suits to which I am referring—and among such machines I did not not see a bias side plaiter like the one here shown.

36 x-Q. Did you ever hear of one before you heard of the exhibit?

A. I have heard of a bias plaiter, but I have never seen one before I saw this exhibit. I cannot recollect what I heard about it, because I heard of a great many things during the old litigations, and I would not attempt to recall now matters which were brought to me as hearsay.

37 x-Q. Did you ever see or hear of a side plaiter built like the bias plaiter exhibit, except in respect to the bias of the plaits, and meant to do the same work as the roller side plaiters?

A. I never saw such a machine. Such machines were not, I think, in use to my knowledge in the factories of those persons who were infringing the patents inquired about. What was done in the factory of those persons who had licenses or agreements under these patents I, of course, cannot say, for I had not any free access to such establishments, and, in fact, in none of the cases was I shown more in the various factories than the machines which were alleged to infringe the patents.

38 x-Q. Is it your opinion that, with the exception of the inventions of the second and fourth claims of the Crosby & Kellogg Patent in suit, the Griffith and Fanning machines contained none of the inventions described and claimed in any of the patents concerning which you have testified?

A. There is no doubt that the terms of the Arnold Reissue claims, and the terms of the Pipo Reissue claims, were broad enough in their language to describe such machines as the Griffith and Fanning machines. I do not refer to all the claims, but to some of the claims of the reissues.

39 x-Q. Is there any material difference between the drawings of the Arnold and Pipo originals and the drawings of the Arnold and Pipo Reissues?

A. I have not made a comparison for many years. I do not recall any material difference, though I claim the right to correct this answer if, on examination of the drawings, I find that I am in error.

40 x-Q. Suppose the Arnold and the Pipo Patents had been originally issued in the precise form in which they were reissued, would the language and claims after such supposed alteration have applied to the mechanism shown in the drawings of said original patents?

A. So far as I can recall the matter, the Arnold description as contained in the reissue was applicable to the drawing. In the case of the Pipo, the reissue description refers to and claims the plaiting blade, as a spring, or as flexible. Now, if I recall the drawings correctly, the blade in the Pipo Patent was shown as thicker than the non-flexible blade of the Crosby & Kellogg Patent, and it was always a question in my mind whether in this regard, Pipo showing anything new or had a right to claim anything beyond what was shown in the Crosby & Kellogg Patent in this regard.

41 x-Q. Do you mean to say that the plaiting blade shown in the Pipo Reissue is of a different thickness from that shown in the Pipo original so far as the drawing is concerned?

A. No. I drew no distinction between the Pipo original and reissue, but I said that the Crosby & Kellogg showed in the drawings a blade as thin as Pipo showed in his patent or reissue, and if one was flexible, the other must be.

42 x-Q. Is the drawing and whole description of the Crosby & Kellogg mechanism as contained in the specification, consistent with flexibility of the blade?

A. Crosby and Kellogg describes a flexible blade as well as a blade which is not described as flexible; however, flexibility is a relative term.

43 x-Q. And in suits brought on the Pipo reissue, you testified, did you not, in substance, that the Crosby description of the flexible blade anticipated any flexible blade shown either in the Pipo original or reissue?

A. I did; but not directly, as I recall the matter. Crosby and Kellogg described a flexible blade, but not one which would press harder in advancing and relieve its pressure in retreat; and they also describe a blade not specified as flexible, which had this peculiar mode of action. I always said, in view of the description, that the Pipo Patent disclosed no substantially new invention where it described a flexible blade adapted to press harder in advancing and relaxing its pressure in retreat.

44 x-Q. Assuming that the Arnold and Pipo reissues were valid, and that the judicial construction of those reissues with reference to roller side-plaiting machines given by the United States Circuit Court is correct, could either the Griffith or the Fanning machine, in your opinion, be capable of practical use without employing the inventions set forth and described in one or both of the said reissues?

A. They would not be capable of use without employing the inventions of the reissues, under the hypothesis of the question.

45 x-Q. It is your opinion that if a machine was made like that shown in the Crosby and Kellogg Patent, but with the sewing mechanism removed and the machine increased in size so as to be capable of operating upon the same width of goods as are operated upon by the Griffith and Fanning machines, assuming that it would be possi-

ble to increase the Crosby and Kellogg mechanism in size as proposed and have an operative machine, would the said enlarged Crosby and Kellogg be as economical and efficient and as good and practical in every respect for doing the work which the Griffith and Fanning machines perform in an establishment where a large amount of plaiting is required to be done?

A. The Griffith and Fanning machines are not primarily intended, either of them, and were not in practice used, to plait a strip of goods which was in width equal to the length of the rollers, but were used in most cases to plait strips of goods passed simultaneously through the rollers.

A Crosby and Kellogg enlarged mechanism could be constructed without the sewing device to do the work as is shown by the bias plaiter, but such enlarged machine, if the sewing mechanism was dispensed with, should, to make it compare with the Griffith and Fanning machine, be provided with heating arrangement to iron down the creases. I think such a machine could be constructed, and that its work would be satisfactory.

46 x-Q. And, it is your opinion, is it not, that such proposed machine would be, in every respect, as efficient and economical as the Griffith and Fanning machine, especially for work on a large scale?

A. I see no reason to doubt that that would be the case. There is no mechanical difficulty in accomplishing the result.

47 x-Q. You consider the feeding mechanism in Griffith and Fanning the equivalent of the four-motion feed?

A. Yes, for the purpose of disposing of the plaits after the mechanism referred to in the second or fourth claims of the Crosby and Kellogg Patent has formed the same.

48 x-Q. And you consider the said feeding mechanism of the Griffith and Fanning the equivalent of the feeding mechanism of both the original and reissued Arnold, do you not?

A. The Arnold Patent, both in the original and the reissue, shows a four-motion feed. For the purpose of removing the plaits after their formation, I think the two rollers of Griffith and Fanning are the equivalent. Arnold refers to a wheel feed.

49 x-Q. Do you consider the sewing mechanism an essential part of the Arnold device?

A. It is made so in the original claim, and the gathers that that machine made were not sufficiently stable or regular to retain any formation whatsoever, without the sewing mechanism. However, a strip of goods could be run through the Arnold machine without the sewing mechanism being employed, and the goods would come out with creases made along one of its edges.

RE-DIRECT-EXAMINATION:

50 Re-d. Q. You speak of having been employed as an expert in a number of suits brought against persons using the Griffith and Fanning machine. When were those suits brought, and when was your employment?

A. It was prior to 1880; I cannot fix the exact date. I should think it was 1877 and 1878.

51 Re-d. Q. And the decisions of the United States Circuit Court that you refer to in those litigations were all upon motions for interlocutory injunctions, with the exception of certain suits that I defended, were they not?

A. I think the question states the fact.

52 Re-d. Q. And the suits referred to in the last question as those that I defended were brought on the Pipo and Robjohn Patents, were they not?

A. Yes.

53 Re-d. Q. Do you know what the final result of those suits was?

A. I do not remember definitely.

54 Re-d. Q. Was Wooster *v.* Handy one of the group of suits last referred to?

A. I think so; yes.

55 Re-d. Q. What was the machine or device that was alleged to infringe Pipo and Robjohn Patents in the suits that I defended?

A. A ruffling attachment for a sewing machine; one was the Toof ruffler, and the other was the Johnston ruffler.

56 Re-d. Q. Look at Blatchford's Reports, Volume 22, pages 307 to 333, inclusive, and state whether the cases there reported are the ones to which you refer under the designation of the litigation that I defended?

A. Yes.

57 Re-d. Q. In all the litigation upon the Arnold Reissue, where the Griffith machine and the Fanning machine were involved, state whether or not you ever expressed the opinion that either of those machines infringed any of the claims of the Arnold Reissue, if the claim was to be construed as limited to a structure substantially as described in the specification and drawings?

A. I never considered that the Griffith and Fanning machine infringed the Arnold Patent—I refer to the reissue—as I understood the said reissue; and my understanding of the reissue involved a construction of the claims as limited to the mechanism substantially as shown and described.

58 Re-d. Q. In all the litigation brought against the Griffith and Fanning machine upon the Arnold Patent or upon the Pipo Patent, were you ever employed otherwise than as an expert for the defendants?

A. I was never employed in any other capacity in these cases.

59 Re-d. Q. Do you remember the so-called reissue decisions of the Supreme Court of the United States?

A. I do.

60 Re-d. Q. Were the decisions that you have referred to that involved the Griffith machine and the Fanning machine before or after the date of the reissue decisions?

A. The decisions were before the date of the reissue decisions of the Supreme Court.

61 Re-d. Q. After the reissue decisions of the Supreme Court, were your services any further required for the defense of the

Griffith and Fanning machines against either the Arnold or the Pipo Reissued Patents?

A. I never was again called upon to do any more work.

62 Re-d. Q. At the time that you were employed in these cases, who was reputed to be the largest manufacturer of plaitings and the like?

A. The Kursheedt Manufacturing Company.

63 Re-d. Q. Did you have any access to their factory in those days?

A. No.

RE-CROSS-EXAMINATION:

64 Re-x-Q. As has appeared from the testimony in this cause, and as you are aware from other sources, Griffith and Fanning machines were both enjoined in this Circuit as infringements of the Pipo and of the Arnold Reissues. So far as you are aware, were those decisions ever reversed or those injunctions dissolved in any instance after the so-called reissue decisions in the Supreme Court, or do you know of any instance of a manufacturer using the Griffith or Fanning machine in disregard of such injunction or without settling and taking a license from the owners of said Pipo and Arnold Reissues?

A. As to the first branch of the inquiry, I recall no reversal of the injunction. As to the second branch of the inquiry, I believe many manufacturers paid license fees, but I have no personal knowledge.

By Mr. Lee:

65 Re-d. Q. You have referred to some of the litigation as being upon the Robjohn Patent, and as relating to the Griffith machine or the Fanning machine. Is that a correct statement?

A. I think the Robjohn related to guides which were not used on the roller side plaiters. The Robjohn Patent was involved against the Toof and the Johnston rufflers.

By Mr. Wetmore:

66 Re-x-Q. Is the Griffith mechanism, as the same appears in the exhibit machine, for causing the back and forward motion of the blade, together with the lifting and depressing motion which takes place as the blade reciprocates, new with that machine, so far as you are acquainted with the art?

A. The lifting and depressing mechanism is, so far as I know, new with Griffith. The driving mechanism is not new with Griffith.

HENRY L. BREVOORT.

Subscribed and sworn to before me this 13th day of February, 1892.

GEO. F. BETTS,
Special Master.

It is admitted that the suits referred to as brought on the Pipo Patent against the users and sellers of the Johnston ruffler and the Toof ruffler were dismissed with costs, and were never appealed. See Wooster *v.* Handy, and other cases, 23 Blatchford, 112.

NEW YORK, February 23d, 1892.

Testimony in Sur-rebuttal on Behalf of the Defendant.

JAMES M. HICKS, recalled, testifies as follows:

1 Q. Have you examined the Complainants' Exhibit Bias Plaiter, and have you read Mr. Brevoort's testimony as to the operation of said plaiter?

A. I have examined the said machine, and have read Mr. Brevoort's testimony in regard to it.

2 Q. Please state whether you can concur with Mr. Brevoort's statements as to the operation of said machine, and, if not, please explain the operation of said machine, as you understand it?

A. I concur with Mr. Brevoort in part, but not as a whole in his testimony regarding said machine. I concur as to the operation of the crimping knife forward and back towards and away from what Mr. Brevoort calls the holder for the goods, while forming the crimp; also as to the existence in this machine of the four-motion feed, which subsequently to the crimping operation feeds the crimps out of the machine. Mr. Brevoort states, as I understand him, that the weight, or what he calls the presser foot, is held down during the feeding operation upon the crimp goods by a strong spring. As I understand the operation of the machine, the presser foot, which is a heavy weight, during the operation of feeding the crimps along is suspended—that is to say, it is sustained in a suspended position and drops upon the folds to compress them after the plaiting operation has taken place. The only pressure then that comes upon the surface or the upper part of the folds or crimps while they are being carried forward out of the machine by the feed is the pressure which the feed gives to the crimps as it rises and passes forward beneath the crimps, so that it does not in this respect act in the same—precisely the same—manner and on the same principle as the Crosby & Kellogg machine would act with a four-motion feed supplied to it. The friction caused by the upward pressure of the feed against the under side of the weighted pressure foot, in its suspended position, would have less tendency to derange the plaits than if the weight rested upon the plaits while the feed was operating, or if the presser foot was held down by a strong spring, as I understand Mr. Brevoort to say is a part of its mode of operation. The said friction which I spoke of would operate or have a tendency to discharge the plaits in the bias-plaiter machine, but in so far as the operation of the crimping knife is concerned, which I understand Mr. Brevoort to say is the essential feature of the machine, it is substantially in

operation the same as the Crosby & Kellogg invention as set forth in the second claim.

3 Q. Is the mechanism of the said machine the same as that of the Crosby & Kellogg, and would it, in your opinion, require invention on the part of a mechanic to construct said machine, in view of everything described and shown in the Crosby & Kellogg Patent?

A. The mechanism in said machine is not exactly the same as in the Crosby & Kellogg machine, and although as regards the lifting of the foot from the cloth during the feeding operation of the machine is suggested in the Crosby & Kellogg Patent, still I think it would require a certain amount of ingenuity or mechanical skill, which, in my opinion, would amount to invention, to adapt it to a machine like the bias plaiter spoken of, or even to the Crosby & Kellogg machine itself.

4 Q. What defects, if any, are there in the actual operation of the machine?

A. The defects in the operation of the machine are, in my opinion, similar to the defects which I have pointed out before in the Crosby & Kellogg machine, that it, more or less, has a tendency to derange the crimps after they are formed while they are being fed through the machine, but, I think, less in degree than in the Crosby & Kellogg machine.

5 Q. What is the object of the notch in the presser foot in the Crosby & Kellogg Patent?

A. I read from the Crosby & Kellogg Patent, page 2, next to the last paragraph, which says: "Both the presser foot and the smoother are in practice, slightly notched on the under edge, the straight sides of the notches being so placed as to resist any tendency of the crimper to draw the goods backward. This is a nicety of construction, not a necessity." Here the patentee evidently provides for an operation of the crimper teeth which he fears would occur, of drawing the goods backward and disarranging the plaits thereby.

6 Q. Did you state or intend to state in regard to the operation of the spacing, as set forth at page 245 of Mr. Brevoort's testimony?

A. I did not intend to make any such statement, and it is manifestly an error; Mr. Brevoort calls it absurd. I agree with Mr. Brevoort perfectly.

7 Q. Would the Griffith & Fanning machines work practically and successfully for commercial purposes in your opinion if the gearing between the rollers was dispensed with and one roller was simply allowed to rest loosely on the other, as was shown by Mr. Wooster in his experiment, as testified to by him.

A. Undoubtedly the friction of one roll upon the other would serve to turn the loose or uncontrolled roll; but when working practically, doing commercial work in a factory, it would be a very unmechanical contrivance and lack positiveness, which is necessary in my opinion for making perfect work.

CROSS-EXAMINATION:

1 x-Q. Does not the Crosby & Kellogg Patent say: "We also intend, by means of a cam or other proper mechanism, to cause the

303 presser foot spring to relax its pressure to a certain extent while the pusher is forcing the goods along?"

A. The Crosby & Kellogg patent uses the language quoted in the question, but in the copy which I have, which is a printed Patent Office copy, the word "proper" is omitted.

2 x-Q. In the view expressed by you in answer to Q. 2, do you not assume that mechanism has been used in the bias plaiter to cause the presser foot-spring to relax its pressure to a certain extent while the four-motion feed is forcing the goods along?

A. I do.

3 x-Q. Is not this relaxation of the presser foot in the bias plaiter effected by means of a cam?

A. It is.

4 x-Q. You do not mean to be understood, do you, that the operation of the cam, when it causes the presser foot to relax its pressure upon the goods while the four-motion feed is carrying the goods forward, is such as to lift the presser foot to such a height as to prevent the four-motion feed from pressing the goods between itself and the presser foot?

A. I do not. I so stated in my former answer.

5 x-Q. In the bias plaiter, what part of the lifting mechanism that serves to relax the pressure of the presser foot is there that is not fairly suggested by the language of the Crosby & Kellogg patent which I have just quoted?

A. As a whole there is nothing, except that the Crosby & Kellogg patent does not suggest the details of the mechanism for accomplishing that object.

6 x-Q. Did you ever make any experiment to test the correctness of the opinion given by you in your answer to question 7, where you speak of the Griffith and Fanning machines having the rollers disconnected?

A. No.

JAMES M. HICKS.

Subscribed and sworn to before me this 23d day of February, 1892.

GEO. F. BETTS,
Special Master.

304 Met pursuant to adjournment.

A. K. SMITH, recalled on behalf of defendants, in rebuttal, testifies as follows:

1 Q. Are you the A. K. Smith who has heretofore testified in this case?

A. I am.

2 Q. Since you last testified have you made any examination of the books of the defendants for the purpose of ascertaining the amount of business done in the cloak department of defendants' firm during the year 1878?

A. I have, sir.

3 Q. In making that examination did you also ascertain the total amount of the sales of suits for that year and the total amount of the sales of suits trimmed with plaitings?

A. I did, sir.

4 Q. Do you know whether or not the business done in the cloak department during the year 1878 is a fair average of the business done in that department during the years covered by this accounting?

A. I think it was.

5 Q. Please state what was the result of your examination as to the total sales of the cloak and suit department during the year 1878?

A. The total sales of the cloak and suit department for the year 1878 amounted to $599,256.62.

6 Q. State, please, the amount of the sales of the suits alone in that department for the same period?

A. $131,287.03.

7 Q. Now state the amount of sales of suits trimmed with plaitings in that department for the same period?

A. $30,614.62.

8 Q. In stating these totals are the thirty and odd thousand dollars of suits trimmed with plaitings included in the one hundred and thirty-one and odd thousand total, and is the one hundred and thirty-one odd thousand total included in the 590 thousand and odd total, or are these totals exclusive of one another?

A. They are included in the totals; that is, the $30,000 is included in the $131,000 and the 30,000 and 131,000 are included in the 599,000.

9 Q. Do you know about what the total business done by Claflin & Co. in the year 1878 amounted to?

A. I do not.

10 Q. Have you any information on that subject; and, if so, please state what it is?

A. Shortly after going with H. B. Claflin & Co., in the year 1876, I heard said that their business amounted to between $30,000,000 and $40,000,000 per annum; that is all I know about their total business.

CROSS-EXAMINED BY MR. LEE:

11 x-Q. Will you state in detail how you reach the result where you give the value of sales of suits with plaitings at $30,614.62?

A. I first took the books containing the numbers of each suit trimmed with plaitings; I then took the sales-book and picked out from the sales of the department for that year the amounts in dollars and cents of the sales of those numbers.

12 x-Q. Are those books here present?

A. The books containing the numbers are; the books containing the sales are not.

13 x-Q. Will you show us your mode of proceeding by reference to the books that are here?

A. I can illustrate to you by exhibiting to you book Exhibit E. The different styles of suits are numbered at the top of each page, and when any plaiting was used for that particular style it was indicated by an entry to that effect.

14 x-Q. Why do you say that in 1878 the amount of sales of these suits presented a fair average of what had been done in the other years covered by this accounting, when you have already, at the outset of this accounting, shown to the master that the number of yards of plaiting used in 1878 upon these suits was 68,190 yards, while in the four years from 1874 to 1877 inclusive, the amount of plaitings used was 413,410 yards?

A. For the years 1874, '75, '76 and '77 we cannot give the number of yards of plaiting used. We have the amount of money paid out for plaiting in those years based on one-half of one cent per yard—the same as we estimated in 1878—which, if correct, would amount to more than in 1878. The bookkeeper employed by us during the years 1874 and 1875 and 1876 informs me that they allowed one cent per yard for plaiting in those years, according to the best of his knowledge and belief; if so, then the amount of plaiting done for those years mentioned would amount to less than in 1878; furthermore, in the commencement of the year 1878, our business for the cloak and suit department had increased to such an amount that we were compelled to rent two more floors than we occupied in 1874, '5, '6 and 1877, and we had not room enough before to do our business.

15 x-Q. Are you certain that some of the numbers which were placed at the head of the pages of the estimate book, to which you have referred, did not have plaitings in them, although no plaitings appear there?

A. I am, sir.

16 x-Q. I observe that the entries are in pencil. Is there no more permanent record made in these books?

A. No, sir.

17 x-Q. How many estimate books cover the whole year 1878?

A. Three.

18 x-Q. Will you designate them as they are now marked exhibits?

A. One is marked "Exhibit E," another one "Exhibit C," and another "Exhibit B."

19 x-Q. Will you state what period each of them covers?

A. Exhibit E covers what is known as the spring season, from January 1st to July 1st. B the same. C covers what is known as the fall season, from July 1st to December 31st.

20 x-Q. Did you, yourself, personally, examine the books, and compile the figures, and make the estimates that are summarized in your direct examination to-day?

A. No, sir.

RE-DIRECT EXAMINATION:

21 x-Q. Please state how the totals were ascertained, and just what you did about it?

A. I took the books containing the number of suits and showed them to two of our clerks that are familiar with our ways of doing business in that particular line, showed them how to do it, and superintended the doing of it, and kept a careful lookout to see that they were doing it correctly. After the amounts were all down, and added up by them, I myself personally went over them to see that the footings were correct.

22 Re-d. Q. Were you employed in the cloak department of Claflin & Company during the year 1878, and, if so, in what capacity?

A. I was employed by H. B. Claflin in 1878 in the position as superintendent of the manufacturing department of cloaks and suits.

A. K. SMITH.

Subscribed and sworn to before me this 24th day of February, 1892.

G. F. BETTS,
Special Master.

Adjourned to February 29th, 1892, 11 A. M.

NEW YORK, June 8th, 1892.

Met pursuant to agreement.

Present—B. F. LEE, Esq., for complainant; EDMUND WETMORE, Esq., for defendants.

Mr. Wetmore states, on behalf of the defendants, that he has no further testimony to offer.

Mr. Lee makes the like statement, on behalf of the complainant.

The testimony before the Master is thereupon closed, and the time for summing up is fixed at such date in September as may be convenient for the Master.

" NEW YORK, June 7th, 1892.

" B. F. LEE, Esq.,
" Nassau St., New York City.

" DEAR SIR: I have no further testimony in the case of Tuttle " vs. Claflin. If you have no further testimony we can, by consent " entered upon the record, close the case and fix a time for summing " up that will be mutually convenient.

" Yours truly,
" EDMUND WETMORE.
" M."

NEW YORK, March 28, 1893.

Met pursuant to notice.

Present—B. F. LEE, Esq., for complainant; EDMUND WETMORE, for defendant.

Mr. Lee requests the Master to fix a day for the hearing of this cause, upon the pleadings, proofs and proceedings before the Master.

Mr. Wetmore's representative states that Monday, May 8, 1893,

A. I can illustrate to you by exhibiting to you book Exhibit E. The different styles of suits are numbered at the top of each page, and when any plaiting was used for that particular style it was indicated by an entry to that effect.

14 x-Q. Why do you say that in 1878 the amount of sales of these suits presented a fair average of what had been done in the other years covered by this accounting, when you have already, at the outset of this accounting, shown to the master that the number of yards of plaiting used in 1878 upon these suits was 68,190 yards, while in the four years from 1874 to 1877 inclusive, the amount of plaitings used was 413,410 yards?

306 A. For the years 1874, '75, '76 and '77 we cannot give the number of yards of plaiting used. We have the amount of money paid out for plaiting in those years based on one-half of one cent per yard—the same as we estimated in 1878—which, if correct, would amount to more than in 1878. The bookkeeper employed by us during the years 1874 and 1875 and 1876 informs me that they allowed one cent per yard for plaiting in those years, according to the best of his knowledge and belief; if so, then the amount of plaiting done for those years mentioned would amount to less than in 1878; furthermore, in the commencement of the year 1878, our business for the cloak and suit department had increased to such an amount that we were compelled to rent two more floors than we occupied in 1874, '5, '6 and 1877, and we had not room enough before to do our business.

15 x-Q. Are you certain that some of the numbers which were placed at the head of the pages of the estimate book, to which you have referred, did not have plaitings in them, although no plaitings appear there?

A. I am, sir.

16 x-Q. I observe that the entries are in pencil. Is there no more permanent record made in these books?

A. No, sir.

17 x-Q. How many estimate books cover the whole year 1878?

A. Three.

18 x-Q. Will you designate them as they are now marked exhibits?

A. One is marked "Exhibit E," another one "Exhibit C," and another "Exhibit B."

19 x-Q. Will you state what period each of them covers?

A. Exhibit E covers what is known as the spring season, from January 1st to July 1st. B the same. C covers what is known as the fall season, from July 1st to December 31st.

20 x-Q. Did you, yourself, personally, examine the books, and compile the figures, and make the estimates that are summarized in
307 your direct examination to-day?

A. No, sir.

RE-DIRECT EXAMINATION:

21 x-Q. Please state how the totals were ascertained, and just what you did about it?

A. I took the books containing the number of suits and showed them to two of our clerks that are familiar with our ways of doing business in that particular line, showed them how to do it, and superintended the doing of it, and kept a careful lookout to see that they were doing it correctly. After the amounts were all down, and added up by them, I myself personally went over them to see that the footings were correct.

22 Re-d. Q. Were you employed in the cloak department of Claflin & Company during the year 1878, and, if so, in what capacity?

A. I was employed by H. B. Claflin in 1878 in the position as superintendent of the manufacturing department of cloaks and suits.

A. K. SMITH.

Subscribed and sworn to before me this 24th day of February, 1892.

G. F. BETTS,
Special Master.

Adjourned to February 29th, 1892, 11 A. M.

NEW YORK, June 8th, 1892.

Met pursuant to agreement.

Present—B. F. LEE, Esq., for complainant; EDMUND WETMORE, Esq., for defendants.

Mr. Wetmore states, on behalf of the defendants, that he has no further testimony to offer.

Mr. Lee makes the like statement, on behalf of the complainant.

The testimony before the Master is thereupon closed, and the time for summing up is fixed at such date in September as may be convenient for the Master.

" NEW YORK, June 7th, 1892.

" B. F. LEE, Esq.,
" Nassau St., New York City.

" DEAR SIR: I have no further testimony in the case of Tuttle " vs. Claflin. If you have no further testimony we can, by consent " entered upon the record, close the case and fix a time for summing " up that will be mutually convenient.

" Yours truly,
" EDMUND WETMORE.
" M."

NEW YORK, March 28, 1893.

Met pursuant to notice.

Present—B. F. LEE, Esq., for complainant; EDMUND WETMORE, for defendant.

Mr. Lee requests the Master to fix a day for the hearing of this cause, upon the pleadings, proofs and proceedings before the Master.

Mr. Wetmore's representative states that Monday, May 8, 1893,

at 11 A. M., would be a convenient time for him, and, thereupon, the Master sets the case down for hearing on that day, at the office of Lee & Lee.

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NEW YORK, June 1, 1893.

Met pursuant to agreement, before GEORGE F. BETTS, Esq., Master, at No. 20 Nassau street, New York.

Present—B. F. LEE, Esq., for complainant; EDMUND WETMORE, Esq., for defendants.

Mr. Lee opened the summing up on behalf of the complainant.

Adjourned to Friday, June 2, 1893, at 11 A. M.

NEW YORK, June 2, 1893.

Met pursuant to adjournment, before GEORGE F. BETTS, Esq., Master, at No. 20 Nassau street, New York.

Present—B. F. LEE, Esq., for complainant; EDMUND WETMORE, Esq., for defendants.

Mr. Wetmore moves to reopen the proofs, in order to allow him to put in testimony concerning actual sales of hand-made plaitings.

After argument, motion denied.

Mr. Wetmore then proceeds with the summing up on behalf of the defendants.

Mr. Lee then closes on behalf of the complainants, concluding at 5.45 P. M.

Defendant's Exhibit Bergenstein. G. F. Betts, Master.

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Whereas, Theodore A. Tuttle, of New Haven, Connecticut, is the owner, as Trustee in Insolvency of the Elm City Company, of Letters Patent of the United States granted C. O. Crosby and Henry Kellogg for an improvement in machines for frilling and crimping, which letters patent bear date the second day of December, 1862, and are numbered 37,033; and

Whereas, Charles Bergenstein and Marquis Miller, composing the firm of Charles Bergenstein & Co., of 325 Canal street, New York City, parties of the second part, desire a license to use machines containing the invention described and claimed in said letters patent:

Now, therefore, this indenture witnesseth that the said Charles Bergenstein and Marquis Miller do each of them hereby admit and acknowledge the validity of said Letters Patent, and covenant and agree not to deny that the ruffling machines used by them are an infringement of said Letters Patent, and agree to advise acquiescence in said Letters Patent by others.

In consideration of which admission and covenants, and in consideration of the sum of two hundred dollars paid by the parties of the second part to the party of the first part, the receipt of which is

hereby acknowledged, of the covenants herein contained, and of the sum of eight hundred dollars to be paid.

The said Theodore A. Tuttle does hereby release the parties of the second part from all claims for damages for past infringement of said patent; and the said Tuttle does hereby grant unto the said Charles Bergenstein & Co. the right and license to use machines containing the invention and improvements secured by said Letters Patent number 37,033, to the full end of the term thereof, so far as the same can be used in manufacturing rufflings, plaitings and trimmings for sale in the market; such use to be in one building, in the City of New York, by said Charles Bergenstein & Co.

It is expressly understood that this license is not assignable, but if the parties of the second part shall go out of business, or take a partner, the party of the first part agrees to grant a license to the successors in business of the parties of the second part for the balance of the term of said patent, without additional charge therefor.

Nothing herein contained shall in any event, by implication or otherwise, be construed as giving to the parties of the second part any right or license to use the invention secured by the said letters patent number 37,033, in the manufacture, use or sale of ruffling attachments, so called, to be used for domestic purposes as an attachment to any of the ordinary forms of sewing machines, an exclusive license therefor having been granted to Samuel E. Barney, Trustee.

The sum of eight hundred dollars, above provided, to be paid by the party of the second part, shall be paid to Alexander E. Kursheedt as Attorney, etc., at the times and in sums as follows:

Two hundred dollars on the first day of January, 1878;
Two hundred dollars on the 1st day of July, 1878;
Two hundred dollars on the 1st day of January, 1879, and
Two hundred dollars on the 1st day of July, 1879.

It is understood and agreed between the parties hereto that this license shall terminate at the option of the party of the first part herein, if at any time the parties of the second part shall fail to fully and completely perform either of the agreements and covenants herein contained for thirty days after written notice of them from the party of the first part that they are so failing to perform any such agreement or covenant.

In witness whereof, the parties hereto have hereunto set their hands and seals the nineteenth day of September, 1877.

ELM CITY CO., [L. S.]
T. A. TUTTLE, Trustee.

In presence of
SAMUEL BARNEY,
as to T. A. Tuttle, Trustee.

Defendant's Exhibit Sidenberg License, March 4, 1890, G. F. Betts, Master.

WHEREAS, Theodore A. Tuttle, of New Haven, Connecticut, party of the first part, is owner, as Trustee in insolvency of the Elm City Company, of Letters Patent of the United States granted to C. O. Crosby and Henry Kellogg for an improvement in machines for frilling and crimping, which Letters Patent bear date the second day of December, 1862, and are numbered 37,033, and

WHEREAS, G. Sidenberg and Company, the parties hereto of the second part, desire to continue the use of machines containing the invention described and claimed in said Letters Patent.

NOW, THEREFORE, this Indenture witnesseth that the said G. Sidenberg and Company admit and acknowledge the validity of said Letters Patent, and covenant and agree not to deny the ruffling machines used by them are an infringement of said Letters Patent, and agree to advise acquiescence in said patent by others.

In consideration of which admission and covenants, and in consideration of fifteen hundred dollars paid by the parties of the second part to the party of the first part, the receipt of which is hereby acknowledged, and in consideration of the further sum of one thousand dollars to be paid as hereinafter stated.

The said Theodore A. Tuttle, Trustee, does hereby release the parties of the second part from all damages from past infringement, and does hereby grant unto the said G. Sidenberg and Company a license and right to use machines containing the inventions and improvements secured by said Letters Patent number 37,033 to the full end of the term thereof so far as the same can be used, in manufacturing Ladies' Linen Collars, Cuffs, Rufflings, Lace Goods, Novelties, &c., for sale in the market, such use to be in the City of New York and by said firm.

It is expressly understood that this license is not assignable, but if the parties of the second part shall go out of business or take a partner the party of the first part agrees to grant to their successors in business a license to continue the use of said improvements without further costs.

Nothing hereinbefore contained, however, shall, in any way, by implication or otherwise, be construed as giving to the parties of the second part any right or license to use the inventions and improvements secured by the said Letters Patent number 37,033, in the manufacture, use or sale of ruffling attachments, so called, to be used for domestic purposes as an attachment to any of the ordinary forms of sewing machines, it being understood that an exclusive license therefor has been granted to Samuel E. Barney, Trustee.

The sum of one thousand dollars above provided to be paid by the parties of the second part shall be paid to Alexander E. Kursheedt, Attorney, etc., at the times and in the sums as follows: Two hundred and fifty dollars, December 2d, 1877; two hundred and fifty dollars, June 2d, 1878; two hundred and fifty dollars, December 2d, 1878; two hundred and fifty dollars, June 2d, 1879.

It is understood and agreed by the parties hereto that this license shall terminate at the option of the party of the first part herein if at any time the parties of the second part shall fail to fully and completely perform either of the agreements and covenants herein contained for thirty days after written notice to them from the party of the first part that they have so failed to perform any such agreement or covenant.

In witness whereof, the parties hereto have hereunto set their hands and affixed their seals the twenty-first day of July, 1877. 314

ELM CITY COMPANY,
T. A. TUTTLE,
Trustee. [L. S.]

In presence of
D. L. CARPENTER,
Witness.

Defendant's Exhibit Affidavit, March 22nd, 1890, G. F. Betts, Master.

U. S. Circuit Court, Southern District of New York.
In Equity.

THEODORE A. TUTTLE, Trustee, &c., }
vs. }
H. B. CLAFLIN *et al.* }

SOUTHERN DISTRICT OF NEW YORK, ss.:

SAMUEL E. BARNEY, being duly sworn, deposes and says, that he has been the Secretary and Treasurer of the Elm City Company of New Haven, Connecticut, ever since the organization of said company in 1860.

Deponent further says that since the decision of Hon. Lewis B. Woodruff, in the suit of the Elm City Company against Geo. H. Wooster, for an alleged infringement of the said Crosby and Kellogg patent, nearly all the large manufacturers of plaitings have taken licenses under the same, and acknowledged its validity, and others who have not taken licenses have acquiesced in the validity of said patent and given up their machines. A copy of the decree entered in said suit is hereto annexed and marked "A." 315

Other decrees have also been entered sustaining the validity of said patent at final hearing, one of which, Elm City Company *v.* Griest, is hereto annexed and marked "B."

The last-mentioned case was tried upon pleadings and proofs before his Honor Judge Drummond. Judge Scates, of Chicago, was counsel for the defense and took the proofs and argued the same.

The following named persons and firms have been licensed under said patent:

IN NEW YORK CITY.

A. T. Stewart & Co.
G. Sidenburg & Co.
Morrison, Herriman & Co.
Taylor & Woodbury.
G. Simon.
Samuel Joseph.
John Lacy.
Lucks Bros. & Hecht.
The Kursheedt Mnfg. Co.
George P. Merivin & Co.
Bach & Fischel.
Bennett & Sweezey.
E. J. Toof, nominee of The Domestic Sewing Machine Co.
L. Dryfoos & Co.
Daniel Miller & Co.
Seamless Clothing Manf. Co.

IN BOSTON, MASSACHUSETTS.

Hogg, Brown & Taylor.
Blackmun & Mandell.
Springer Bros.
George Frost.

IN HOLLISTON, MASS.

E. W. Colburn.

IN CALIFORNIA.

Muser Bros. and H. Lash, of San Francisco.

IN IOWA.

The Johnston Ruffler Co., of Ottumwa.

IN CONNECTICUT.

The Union Ruffler Co., of New Haven.

IN CHICAGO, ILL.

The Griest Manufact'g Co.
W. G. Wilson.

IN PHILADELPHIA, PENNSYLVANIA.

And machines have been surrendered, past infringement of the country who have agreed not to infringe said patent.

I annex hereto copy of an agreement made with the firm of Silberberg Bros., who delivered up their machine, which said agreement is marked "C."

Silberberg Bros. had been infringing both a short time; many persons have paid a much larger sum for damages for past infringements; one firm, viz., Kursheedt, King & Co., paid for past infringement Five thousand dollars, and agreed to take a license.

The business of the licensees under said patent is greatly injured

by such infringement, and it is doing great injury to the interests and business of the Elm City Company, T. A. Tuttle, Trustee.

SAMUEL E. BARNEY.

Sworn to before me this 5th day of August, 1878.

EDWARD C. GARRETT, JR.,
Notary Public,
N. Y. Co.

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States for the Southern District of New York, Do Hereby Certify that the foregoing is a true and correct copy of an affidavit of Samuel E. Barney, used on a motion for injunction in the suit of Theodore A. Tuttle, Trustee, *v.* Horace B. Claflin, *et al.*, and being a portion of the motion papers on said motion for injunction filed herein Nov. 18, 1878, now on file and remaining of record in my office.

[SEAL.]

In Witness Whereof, I have subscribed my name and have caused the seal of said Court to be hereunto affixed this Twenty-first day of March, in the year of our Lord one thousand Eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

JOHN A. SHIELDS,
Clerk.

Defendant's Exhibit Affidavit.—March 22, 1890.—G. F. Betts, Master.

U. S. Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, &c.
vs.
H. B. CLAFLIN.

SOUTHERN DISTRICT OF NEW YORK, ss.:

CHARLES B. STOUGHTON, being duly sworn, deposes and says that the machine referred to in the affidavit of E. J. Toof, made herein on the fifth day of August, 1878, was delivered up by Taylor and Linder, who had been licensees under the Crosby and Kellogg patent number 37,033, and the agreement under which the same was delivered up is hereto annexed and marked "A."

That said Taylor and Linder had paid royalty under said Crosby and Kellogg patent for the use of said machines for several years prior to its being so delivered up.

CHAS. B. STOUGHTON.

Sworn to before me this 5th day of August, 1878.

EDWARD C. GARRETT, JR.,
Notary Public,
N. Y. Co.

A.

In consideration of fifty dollars ($50.00) and the delivery of three machines, received from Taylor and Linder, it is hereby agreed by the Elm City Company, that the same is in full of all claims of every kind whatsoever which the said Elm City Company has against the said Taylor and Linder, or against either of the members of the said firm, for license fees, royalty or other charges, for use of plaiting machines to date.

It is also agreed that the license heretofore granted to Taylor and Linder shall be, and the same is hereby, cancelled.

Dated New York, March 27th, 1878.

TAYLOR AND LINDER.

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States for the Southern District of New York, do hereby certify that the foregoing are true and correct copies of an original affidavit of Charles B. Stoughton, and a copy of an agreement annexed thereto and marked "A," the same being a portion of motion papers for an injunction filed in the Clerk's office of this Court, on Nov. 18th, 1878, in the suit of Theodore A. Tuttle, Trustee, &c., *v.* H. B. Claflin, *et al.*, now on file and remaining on record in my office. In witness thereof, I have subscribed my name and caused the Seal of the said Court to be hereunto annexed this twenty-first day of March, A. D. 1890.

[SEAL.]

JOHN A. SHIELDS,
Clerk.

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Defendant's Exhibit Pipo Injunction Order, March 11, 1890. G. F. Betts, Master.

At a Circuit Court of the United States, held at the Court House in the City of New York, on the 28th day of February, 1879.

Present—Hon. SAMUEL BLATCHFORD, Circuit Judge.

GEORGE H. WOOSTER
vs.
HORACE B. CLAFLIN, *et al.*

A motion for a preliminary injunction having been made herein; and it being represented that Letters Patent of the United States were issued to John A. Pipo, of the City of New York, in due form of law, on the 27th day of January, 1863, No. 37,550, for an improvement in machines for making ruffles, and that the said letters patent were duly assigned to George H. Wooster, of the City of New York, and upon the 27th day of July, 1875, were reissued to said George H. Wooster, in due form of law, and numbered 6,565; and that the said defendants have infringed the same; and the said

motion coming on to be heard, after hearing Frederic H. Betts, Esq., on behalf of the same, and Edmund Wetmore, Esq., opposed, and after reading and filing the affidavits and papers of the respective parties; on motion of Betts, Atterbury & Betts, complainant's solicitors.

Ordered, that a preliminary injunction issue out of and under the seal of this Court, enjoining and restraining the defendants and their associates, clerks, agents, servants and workmen, from directly or indirectly making or causing to be made, using or causing to be used, or vending to others to be used, in any manner, any devices made or constructed, as have been heretofore used by the defendants, and known in this suit as the Griffith and Fanning machines, containing or embodying certain of the inventions described and claimed in said reissued patent, and specified in the following claims, to wit:

1. In a ruffling mechanism, a spring or flexible blade, having its acting edge turned or bent toward the surface against which it acts to form the ruffle, in combination with a carrier, to which the blade is rigidly attached, substantially as described.

2. A ruffling blade arranged above the cloth plate, and combined with an actuating lever adapted to carry and press the blade on the goods in advancing, and to relieve the pressure of the blade from the surface of the goods while retreating, substantially as described.

7. The combination, with the actuating lever and ruffling blade, of a regulating device to regulate the extent of backward movement of the blade, without affecting the position to which the forward end of the blade moves, for the purpose set forth.

8. In a ruffling or plaiting mechanism, a spring or flexible blade rigidly affixed to its carrier, in combination with a surface opposed to the blade, and adapted to sustain the material being ruffled against the action of the blade, substantially as described.

13. The combination of a rocking or elbow lever, and an adjustable ruffling blade operated by the lever with mechanism, substantially as described, for adjusting the throw of the lever.

or from infringing said letters patent in any way whatsoever.

SAML. BLATCHFORD.

[ENDORSED:] United States Circuit Court, Southern District of New York. In Equity. George H. Wooster *vs.* Horace B. Claflin *et al.* Order. Betts, Atterbury and Betts, 20 Nassau St., N. Y. City, Complainant's Solicitors. U. S. Circuit Court, filed March 1, 1879, John I. Davenport, Clerk.

(A copy.)

JOHN A. SHIELDS,
Clerk.

[SEAL.]

Defendant's Exhibit Pipo Injunction, March 11, 1890, G. F. Betts, Master.

THE PRESIDENT OF THE UNITED STATES, TO HORACE B. CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE, DANIEL ROBINSON and JOHN CLAFLIN, composing the firm of H. B. Claflin & Co., their Clerks, Attorneys Agents, Servants and Workmen, GREETING:

WHEREAS, it has been represented to us in our Circuit Court of the United States for the Second Circuit and Southern District of New York, that Letters Patent of the United States were issued to John A. Pipo, in due form of law, on the 28th day of January, 1863, No. 37,550, for an Improvement in Machines for making ruffles, and that the said letters patent were duly assigned to George H. Wooster, and were duly reissued to George H. Wooster on the 27th day of July, 1875, as No. 6,565, and

WHEREAS, it has been represented to us that you, the said Horace B. Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson and John Claflin, composing the firm of H. B. Claflin & Co., have infringed the same;

NOW, THEREFORE, we strictly command and enjoin you, the said Horace B. Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson and John Claflin, and your said firm of H. B. Claflin and Co., and your clerks, agents, servants and workmen, under the penalties that may fall on you in case of disobedience, that you forthwith and until the further order of this Court desist from, directly or indirectly, making or causing to be made, using or causing to be used, or vending to others to be used in any manner, any devices made or constructed as you have heretofore made, constructed or used the same, and known in this suit as the Griffith and Fanning machines, containing or embodying the said invention granted by said letters patent and the reissue thereof, and from infringing the following claims of said reissued letters patent No. 6,565, dated July 27th, 1875, to wit: the first, second, seventh, eighth and thirteenth claims, or from infringing said letters patent in any way whatsoever.

Witness the Hon. MORRISON R. WAITE, Chief Justice of [SEAL.] the Supreme Court of the United States, at the City of New York, on the 14th day of March, 1889.

JOHN I. DAVENPORT,
Clerk.

BETTS, ATTERBURY & BETTS,
Complainant's Solicitors,
20 Nassau Street, N. Y.

CITY AND COUNTY OF NEW YORK, ss.:

BENJ. A. SILL, being duly sworn, deposes and says that he is of mature age, and that on March 14, 1879, at No. 140 Church St., New York City, he served the within injunction on Horace B. Claflin,

named therein, by delivering a copy of the same to him personally, and leaving it with him, at the same time exhibiting to him the original injunction.

He further says that he knew the person so served to be the individual described in said injunction.

BENJ. A. SILL.

Sworn to before me this 15th day of March, 1879.

GEO. M. BAKER,
[SEAL.] Notary Public,
New York County.

I hereby certify that the within injunction was served, as appears by the foregoing affidavit of Benj. A. Sill.
N. Y., March 18/79.

LOUIS F. PAYN,
U. S. Marshal.

I hereby depute Benj. A. Sill to serve the within injunction.
N. Y., March 14, 1879.

LOUIS F. PAYN,
U. S. Marshal.

[ENDORSED:]—U. S. Circuit Court, Southern District of New York.—George H. Wooster *vs.* Horace B. Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, Daniel Robinson and John Claflin, composing the firm of H. B. Claflin & Co.—Injunction.—Betts, Atterbury & Betts, Complainant's Solicitors, 20 Nassau St., New York.—U. S. Circuit Court.—Filed March 18, 1879.—John I. Davenport, Clerk.

A copy.

[SEAL.] JOHN A. SHIELDS,
Clerk.

Plaintiff's Exhibit Arnold Reissue Bill.—December 23, 1891.—G. F. B., Special Master.

United States Circuit Court, Southern District of New York.

BENJAMIN URNER, Trustee,
vs.
HORACE B. CLAFLIN, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE and DANIEL ROBINSON. } In Equity.

TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

Benjamin Urner, a trustee of George B. Arnold, of New Jersey, and doing business in the City of New York, brings this his bill of complaint against Horace B. Claflin, John Claflin, Edward E.

Eames, of the Cfty of Brooklyn, and citizens of the State of New York; Horace J. Fairchild, residing in the United Kingdom of Great Britain and Ireland; William S. Dunn and Daniel Robinson, of the City of New York, and citizens of the State of New York; and Dexter N. Force, of the State of New Jersey, all of whom are doing business in the City of New York, and Southern District of New York.

And thereupon your orator complains and says that before the eighth day of May, eighteen hundred and sixty, George B. Arnold, of New York City, was the first and original inventor of a new and useful improvement in sewing machines, and thereupon having duly applied to the Commissioner of Patents of the 325 United States for Letters Patent for the said invention, there were issued on the said eighth day of May, Letters Patent of the United States in due form of law, granting to the said George B. Arnold, his executors, administrators and assigns, for the term of fourteen years from the said eighth day of May, Anno Domini eighteen hundred and sixty, the full and exclusive right to make, use, and vend to others to be used, the said improvement in sewing machines, as by reference to said original Letters Patent and to the schedule accompanying the same, or a true copy thereof in Court to be produced, will more fully and at large appear. That thereupon, after the issuing of said Letters Patents as aforesaid, the said Arnold put the said invention into use.

And your orator further shows unto your Honors that before the expiration of said original Letters Patent, the said George B. Arnold applied to the Commissioner of Patents for an extension thereof, whereupon on the fifth day of May, eighteen hundred and seventy-four, the Commissioner of Patents in due form of law extended the said Letters Patent for the term of seven years from the eighth day of May, eighteen hundred and seventy-four, as by reference to the original certificate of extension, here in Court ready to be produced, or to a true copy thereof, will more fully appear.

And your orator further shows unto your Honors that heretofore, and on or about the twenty-second day of July, eighteen hundred and seventy-four, the said Arnold, finding that the said patent which had been granted to him was inoperative by reason of a defective or insufficient specification, and the said error having arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention on the part of said Arnold, he surrendered said patent to the Commissioner of Patents, according to the statutes of the United States in such case made and provided, and having amended the specification and claims in accordance with the decis- 326 ions of said Commissioner in the premises, and in all things having complied with the statutes of the United States in such case made and provided, new Letters Patent of the United States for the same invention were, on the first day of December, eighteen hundred and seventy-four, issued and delivered to said Arnold according to law, being numbered 6159, whereby there was granted to said Arnold, his heirs and assigns, for the then unexpired time of twenty-one years from the eighth day of May, eighteen hundred and sixty, the full and exclusive right and liberty of making, constructing, using and

vending to others to be used the said invention or discovery, as will more fully appear by the said reissued Letters Patent or a certified copy thereof ready in court to be produced.

And your orator further shows unto your Honors that thereafter, and on the twenty-first day of December, eighteen hundred and seventy-five, the said Geo. B. Arnold, being still the sole owner of said reissued Letters Patent, did sell, assign and transfer unto your orator, as trustee, by an assignment in writing, duly signed and executed, all his right, title and interest in and to the said reissued Letters Patent, which assignment was duly recorded in the Patent Office on the fourth day of January, eighteen hundred and seventy-six, in Liber B 20, p. 161, of Transfers of Patents, as by reference to said original assignment in Court to be produced will more fully appear.

And your orator further shows unto your Honors that the invention made by said Arnold, and set forth and claimed by said Letters Patent, has been and is still of great value to the public, and in consequence thereof new and valuable manufactures have been produced and sold to a large extent, the same having been made by the use of substantially the same mechanism as is shown and described in said Letters Patent.

And your orator further says that no one has ever denied that the said Arnold was the first and original inventor of the improvement set forth in said letters patent, except that some persons have wrongfully claimed that the invention described therein was substantially the same as that shown and described in certain letters patent of the United States, granted to Isaac M. Singer on the eighteenth day of March, 1856, No. 14,475. That your orator avers that such is not the fact, and that the said Arnold, at the time he made the application for his said letters patent previously granted to Isaac M. Singer, made his application for a patent for the reason that he believed he had made an improvement in sewing machines different from that described in the said patent of the said Singer, as also was the opinion of the Commissioner of Patents at the time when the said Arnold made his application, and when his said patent was granted, on the eighth day of May, eighteen hundred and sixty.

And your orator further shows unto your Honors that in eighteen hundred and seventy-four, when the said Arnold made an application for an extension of said letters patent, said application was strongly opposed by one George H. Wooster and his counsel, and principally upon the ground that the said letters patent were for the same invention as that described in the aforesaid letters patent granted to Isaac M. Singer, and the testimony of several experts in relation thereto was taken in behalf of the said contestants; but, after an examination of all the evidence taken in said matter, and after full argument of counsel, the Commissioner of Patents granted the application of said Arnold for the said extension, and in his opinion in relation thereto said as follows: "The novelty of the invention here claimed is attacked by remonstrants mainly on the ground that the patent granted to I. M. Singer, March 18th, 1856, furnished a substantial anticipation. I have carefully compared the

two patents and am fully satisfied that the limited invention claimed by Arnold is not anticipated by anything in the Singer patent. Arnold moves his gatherer to form the gather while the feed remains stationary, and when the gather is laid or spaced, then the feed proper moves with the gatherer the length of the desired stitch. 328 Singer always moves the gathering and feeding devices together, the one faster than the other, and this, too, whether he uses a four-motion feed or a wheel feed. This is the distinctive difference between the Arnold and Singer inventions, and is just that which makes the Arnold machine practical and valuable."

Your orator further represents that thereafter, upon the surrender by the said Arnold of the said extended letters patent, and upon the reissue thereof, the said Arnold and the Commissioner of Patents each acted with a full knowledge of the invention set forth and described in the said patent of the said Singer, and the invention set forth, described and claimed in the said reissued letters patent in no part thereof is substantially the same as the invention set forth, described and claimed in the said patent of the said Singer.

And your orator further shows unto your Honors that heretofore, and on or about the 19th day of January, 1876, your orator filed his bill of complaint in the Circuit Court of the United States for the Southern District of New York, against the Wilcox & Gibbs Sewing Machine Company for an alleged infringement of said reissued letters patent No. 6,159, by the said Wilcox & Gibbs Sewing Machine Company, in the sale by them of certain sewing machine attachments known as the "Johnston Ruffler;" such sewing machine attachment had been made by the Johnston Ruffler Company of Ottumwa, Iowa.

And your orator further shows unto your Honors, that in the said suit a motion for a preliminary injunction was made, based upon the facts set forth in the said bill of complaint, and in certain affidavits duly served upon the defendants, and produced before the Court.

And your orator further shows unto your Honors, that thereafter the said motion for preliminary injunction was heard by his Honor, Judge BLATCHFORD, sitting as a Justice of the Circuit Court for the Southern District of New York, and after the presentation 329 to him of numerous affidavits filed by the defendants, the said Wilcox & Gibbs Sewing Machine Company, and of the affidavits filed by your orator, and after hearing the argument made in behalf of the defendants by E. W. Stoughton, Esq., of New York City, and in behalf of your orator by E. N. Dickerson, Esq., of New York, his Honor rendered an opinion as follows:

United States Circuit Court.

BENJAMIN URNER, Trustee, etc.,
vs.
THE WILCOX & GIBBS SEWING MACHINE COMPANY and others.

BLATCHFORD, J.: "I think the plaintiff has made out a case free from all reasonable doubt, and that Arnold's invention is not anticipated by that of Singer. But the defendants must be allowed the option of taking a license in a proper form on proper terms. An

injunction will be granted if such license is not taken. If the parties cannot agree on the terms of a license, it may be referred to the clerk to take proofs, and ascertain what the terms ought to be" (Filed June 14th, 1877).

Your orator further shows unto your Honors that after the filing of said opinion your orator learned that though the Wilcox & Gibbs Manufacturing Company were the defendants in said suit, yet that the defense of said suit had been in part conducted by the said Johnston Ruffler Company and certain other parties, manufacturers of ruffler attachments, who had agreed with the said Johnston Ruffler Company that they would contribute to the defense of said suit.

And your orator further shows unto your Honors that, after the filing of said opinion by Judge BLATCHFORD, an agreement of license was made between him and the said Johnston Ruffler Company, by which the said Johnston Ruffler Company took a license under the said Reissued Letters Patent, admitting the validity thereof, and agreed that they would pay at least One thousand five hundred dollars per year as royalty thereunder, such license being confined to the manufacture of ruffling attachments to sewing machines for domestic use.

And your orator further shows unto your Honors that since the rendering of the said opinion by his Honor, Judge BLATCHFORD, in the said suit against the Wilcox & Gibbs Sewing Machine Company, there has been a general acquiescence in this Circuit in the validity of said Reissued Letters Patent.

And your orator further shows unto your Honors that since the filing of said opinion and the taking of said license by the said Johnston Ruffler Company, your orator has granted licenses for manufacturing purposes to the following parties, all of them being manufacturers of trimmings and plaitings :

The Elm City Company, New Haven.
The Kursheedt Manufacturing Company, New York City.
G. Sidenberg & Co., New York City.
Ansel Hecht, New York City.
John Lacy, New York City.
Luchs Bros., New York City.
Charles Bergenstein & Co., New York City.
Lowenstein Bros., New York City.
G. Simon, New York City.
Back & Fishel, New York City.
Kisch & Simson, New York City.
Magic Ruffle Co., New York City.
A. Redlich & Co., New York City.
Emil S. Levi, New York City.
Helen Bruce, New York City.
Joseph Kearnly, New York City.
H. Lash, San Francisco.
Muser Bros., San Francisco.

And your orator further shows unto your Honors that each of the said parties have, in their said licenses, admitted the validity of said

reissued Letters patent, and have each agreed to pay your orator a royalty of one thousand dollars a year.

And your orator further shows unto your Honors that since the said opinion of his Honor Judge BLATCHFORD was filed, various other persons have taken licenses under the said Letters patent, have admitted the validity thereof, and have agreed to pay royalty thereunder. And that various other persons have admitted the validity of the said Letters patent, and made settlement for the past infringement of the same, and abandoned the further use of infringing machines.

And your orator further shows unto your Honors that the defendants herein, the said Horace B. Claflin, John Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force and Daniel Robinson, without the license or permission of your orator and in violation of the rights secured to him by said Letters Patent, and the assignment thereof, have been using a large number of machines, substantially the same as the improvements in sewing machines described and claimed in said reissued Letters patent whereby they have made great gains and profits, and have inflicted great damage and injury upon your orator.

And your orator further shows unto your Honors, that the aforesaid actings and doings of the defendants are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises. In consideration whereof, and forasmuch as your orators can have adequate relief only in this Court, where matters of this sort are properly cognizable and relievable, and to the end therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their corporal oath, and to the best of their knowledge, information and belief, full, true, direct, and perfect answer make to all the matters and things hereinbefore set forth or charged, and that as fully and particularly as if the same were here again repeated, and the defendants particularly interrogated thereto; and that they may be enjoined and restrained, by a writ of injunction issued out and under the seal of this Honorable Court, from directly or indirectly using, or vending, or causing to be used or vended, the improvements in sewing machines such as they are now using as hereinbefore set forth, or any improvement in sewing machines, or such as are substantially the same or as embody the said inventions and improvements, or any of them, or any substantial or material part thereof patented by the said Letters patent owned by your orator as aforesaid, and from, in any way, directly or indirectly, infringing said patent or any part thereof, and that the said defendants may be decreed to account and pay over to your orator the gains and profits by them made or realized by the use of the aforesaid invention or any part thereof, and all damages sustained by your orator by reason of the said infringement, and that your orator may have such other and further relief as may be consistent with equity and good conscience.

May it please your Honors to grant unto your orator not only a writ of injunction issuing out of and under the seal of this Honorable Court, directed to the said defendants, Horace B. Claflin, John

Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force and Daniel Robinson, their agents, servants, attorneys, workmen, and each of them, commanding, enjoining and restraining them as your orator has in that behalf prayed, but also a writ of subpœna issuing out of and under the seal of this Court, directed to the said defendants, commanding them to appear at a certain time in this Court, to answer the premises, and to stand to and abide such orders and decrees herein as may be consistent with equity and justice, and as shall be made against them.

And your orator, as in duty bound, will ever pray, etc.

CHAS. E. POUCHER,
Solicitor of Complainant and
of Counsel,
317 Broadway,
New York.

Southern District of New York, ss. :

BENJAMIN URNER, being duly sworn, says that he is the complainant herein ; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein alleged to be stated on information and belief, and as to those matters he believes it to be true.

BENJ. URNER.
[SEAL.]

Sworn and subscribed before me this
25th day of September, 1878.

JAS. J. ADAMS,
Notary Public,
N. Y. Co.

[ENDORSED :]—U. S. Circuit Court, Southern District of New York. In Equity. Benjamin Urner, Trustee, etc., *vs.* Horace B. Claflin, John Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force, and Daniel Robinson. Bill of Complaint. Chas. E. Poucher, Jr., Solicitor for Complainant, 317 Broadway, New York. U. S. Circuit Court. Filed Sept. 25, 1878. John I. Davenport, Clerk.

(A Copy.)
JOHN A. SHIELDS,
Clerk.

[SEAL.]

Plaintiff's Exhibit Arnold Reissue Answer, December 23, 1891. G. F. B., Special Master.

United States Circuit Court, Southern District of New York.

BENJAMIN URNER, as Trustee, Complainant,
vs.
HORACE B. CLAFLIN, and others, Defendants.
} In Equity.

TO THE HONORABLE THE JUDGES OF SAID COURT :

These defendants, now and at all times hereafter saving and reserving unto themselves all and all manner of benefit or advantage

that may or can be had or taken to the manifold errors, uncertainties, imperfections and insufficiencies in the said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof, as they are informed it is material or necessary for them to make answer unto, answering say:

I. That they are informed and believe, and therefore admit, that Letters Patent of the United States were, on the 8th day of May, 1860, issued to George B. Arnold, entitled "for an alleged improvement in sewing machines," but these defendants deny that the said George B. Arnold was the original and first inventor of the said alleged improvement described in said Letters Patent, and these defendants are not informed whether in other respects the requirements of law relative to granting Letters Patent were complied with by the said George B. Arnold, or what, if any, proceedings were had prior to the issue of said Letters Patent, and therefore deny the same and leave the plaintiff to make such proof thereof as he shall be advised. And these defendants deny that the said Letters Patent granted or secured to the complainant any exclusive rights or privileges whatever. And these defendants say that they have no knowledge or information sufficient to form a belief whether, after the issue of said letters patent as aforesaid, the said Arnold put the said alleged invention into use, and they, therefore, deny the same.

II. And these defendants, further answering, say that they are informed and believe that before the expiration of said original Letters Patent the said George B. Arnold applied to the Commissioner of Patents for an extension thereof, but they have no knowledge or information sufficient to form a belief whether the Commissioner of Patents in due form of law extended the Letters Patent for a term of seven years from the 8th day of May, 1874, and they, therefore, deny the same.

And these defendants, on information and belief, deny that the reissue of the said patent set forth in the bill of complaint was lawfully granted, or that the said original patent was inoperative by reason of a defective or insufficient specification, or that any error had arisen by inadvertence, accident or mistake. On the contrary, these defendants are advised, and they allege and insist, that the said reissued Letters Patent are upon their face void, and the Commissioner of Patents had no jurisdiction to reissue the same, because the said reissue describes and claims a different invention from that for which the said original Letters Patent were granted, and because new matter, not shown or suggested in the original specification or drawings or model accompanying the same, is inserted and described and attempted to be claimed by the said reissue, and that the said reissue is without effect and utterly void.

III. And these defendants, further answering, say that they have no knowledge or information sufficient to form a belief whether the said George B. Arnold executed and delivered to the complainant the instrument of assignment, or whether the same was recorded, as in the bill of complaint mentioned, and they therefore deny the same and leave the complainant to make such proof thereof as he shall be advised; but they aver that if said instrument of assignment was

delivered it did not carry any title or create any trust valid in law or equity, and that the said George B. Arnold and others, whose names are unknown to these defendants, remain entitled to the true beneficial interest in said reissued Letters Patent, and that this suit is not brought by the real parties in interest, and that there is a defect of parties complainant, and the complainant is not entitled to maintain this suit, and that the said bill of complaint should be, therefore, dismissed.

IV. And these defendants, further answering, deny, on information and belief, that the actual invention made by said Arnold has been or is of great value to the public, or that any new or valuable manufactures have been made by the use of substantially the same mechanism as that shown and described as new in said original Letters Patent, or in said reissued Letters Patent, except as the said last mentioned letters contain interpolations of matters and things never invented or suggested by the said Arnold, and they deny that no one has ever denied that the said Arnold was the first and original inventor of the improvement set forth in said Letters Patent, except that certain persons claimed that the invention therein was substantially the same as that shown and described in certain Letters Patent of the United States granted to Isaac M. Singer.

V. And these defendants, further answering, admit that the original Letters Patent issued to the said George B. Arnold were extended by the Commissioner of Patents after opposition by one George H. Wooster, and that the said bill of complaint correctly sets forth a part of the opinion of the Commissioner in granting said extension, but does not set forth that part of said Commissioner's opinion which immediately follows the portion so quoted in said bill of complaint, which is as follows :

" The first and second claims of Arnold are limited to the peculiarity of construction, although a mistake has been made in the statement of its operation in the first.

The third claim is for an act or method without reference to the mechanism employed. It is not simply defective in form, it is purely functional, and no legitimate construction would include the mechanism, and so save the claim. It is therefore improper, and probably would not be sustained by any Court."

And the said opinion referring to said patent concluded as follows :

" The patent No. 28,139 for the machine will be extended on filing a disclaimer to the third claim and compliance with rules in other particulars."

VI. And these defendants allege, on information and belief, that the said Arnold filed a disclaimer as required, as a condition of obtaining said extension; but that after the said letters were so extended, the same was reissued as set forth in said complaint, and, as the defendants are informed and believe, the said Arnold and the complainant herein wrongfully claim and pretend, that the said reissued Letters Patent are, in substance, for the same thing among others, that the said Arnold disclaimed as aforesaid.

VII. And these defendants further answering, admit that the opinion quoted at folio 17 of said complaint in the suit entitled Ben-

jamin Urner, Trustee, &c., *v.* The Wilcox & Gibbs Sewing Machine Company and others, was filed on the 14th day of June, 1877, but these defendants allege that the ruffling attachment, the use of which was claimed in said suit to be an infringement of the said Letters Patent number 6,159, is substantially different from the machine the alleged use of which by the defendants is wrongfully claimed by the complainant herein to constitute an infringement of the said Letters Patent, and that material and important evidence and facts establishing the invalidity of said reissued Letters Patent were not presented to the Court upon the motion for a preliminary injunction, in which the said decision of his Honor Judge BLATCHFORD was rendered.

VIII. And these defendants, further answering, say that they do not know and are not informed, save by said bill of complaint, whether the Johnston Ruffler Company and the other persons, firms and corporations named in the said bill of complaint, have taken license from the complainant for manufacturing purposes, but they deny that there has been a general acquiescence in this Circuit in the validity of said Letters Patent, since the decision of the motion for preliminary injunction in the said suit against the Wilcox & Gibbs Sewing Machine Company, or at any time, and they allege on information and belief, that if said licenses have been taken they have been taken by the licensees in ignorance of their rights and of the facts affecting the validity and limiting the scope of the said Letters Patent in the said bill set forth.

IX. And these defendants, further answering, say that the said invention set forth and described and claimed in the said reissued Letters Patent, or material parts thereof, were known to or used by sundry persons in this country, and patented or described in printed publications, long prior to the alleged invention and discovery thereof by the said Arnold, and that the following are the names of such persons and their residences, and the titles of such patents and publications, as far as known to these defendants at the time of making this answer, viz :

Andrew Campbell, who resides in the City of Brooklyn, at the City of New York ; John Winkie, who resides in the City of Brooklyn, at the said City of New York ; S. Goldman, who resides at San Francisco, California, at the said City of New York ; Bodenstein, whose first name is unknown to these defendants, and who, to the best of defendants' knowledge, resides in Germany, at the said City of New York ; Joseph Thomas, who resides in Hoboken, at the said city of New York ; William Walker, deceased, at the said city of New York ; Penman, deceased, at the said city of New York ; Thompson, deceased, at said city of New York ; the said last three persons belonging to the firm of Walker and Penman, formerly doing business in said city of New York ; John Mack, who resides in the city of New York, at said city of New York ; John Dane, Jr., who resides in the city of New York, at the city of Lowell, in the State of Massachusetts ; Edward Husson, deceased, at the said city of New York ; Wuterich, who resides in Brooklyn, at the said city of New York ; Wellwood Murray, who resides in the said city of San Francisco, California, at said city of New York ; and at

Edinburgh, Scotland, and in the city of Paris, France; Luther Hall, who resides in the city of Boston, at the town of Chelmsford, in the State of Massachusetts; John Fanning and Mrs. Fanning, his wife, and Barrett, who reside in the city of Brooklyn, at said city of Brooklyn, and at the said city of New York; William H. Lazell, of Pearl River, in the State of New York; John E. Earle, who resides in the city of New Haven, at said city of Brooklyn, and in the city of New Haven, and Hathaway, whose present residence is unknown to these defendants, at said city of Brooklyn and said city of New Haven, and also by numerous other persons whose names and residences are now unknown to these defendants; but which, when known, the defendants pray leave by proper amendment to insert in this answer.

And these defendants, on information and belief, aver that the said invention, or material and substantial parts thereof, was patented or described in printed publications in this and other countries long prior to the alleged discovery and invention thereof by the said Arnold, and that, among others, it was so patented and described in Letters Patent of the United States, issued to Isaac M. Singer for an improvement in sewing machines, dated March 18th, 1856, No. 14,475, and also in divers others Letters Patent and publications, the titles of which are now unknown to these defendants. And, especially, these defendants aver, on information and belief, that plaiting machines substantially the same as those in use by the defendants were patented and described in printed publications in France at or prior to the year 1857. And these defendants pray, when they shall ascertain the title of said patents and publications, that they may by proper amendment insert the same in this answer.

X. And these defendants, further answering, deny that they have been or are manufacturing, using or selling improvements in sewing machines, substantially the same as the improvements in sewing machines described and claimed in said reissue Letters Patent, or that they have at any time or in any manner infringed any of the lawful rights or privileges of the complainant, or inflicted upon him great or any damage or injury; and that they submit that the complainant is not entitled to any further answer to the said bill of complaint, and pray that they may be hence dismissed, with their costs and charges in this behalf most wrongfully incurred.

H. B. CLAFLIN,
by JOHN CLAFLIN, Atty.
EDWARD E. EAMES,
H. J. FAIRCHILD,
p. p. D. N. FORCE,
W. J. DUNN,
p. p. D. N. FORCE,
D. N. FORCE,
DANL. ROBINSON,
JOHN CLAFLIN.

VANDERPOEL, GREEN & CUMING,
Defts.' Solicitors.

EDMUND WETMORE,
Of Counsel for Defendants.

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UNITED STATES OF AMERICA, } ss. :
Southern District of New York, }

EDWARD E. EAMES, DEXTER N. FORCE, DANIEL ROBINSON and JOHN CLAFLIN, being severally duly sworn, say, and each for himself says : That he is one of the defendants herein, and that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

EDWARD E. EAMES,
D. N. FORCE,
DANL. ROBINSON,
JOHN CLAFLIN.

[SEAL.]

Sworn to before me this 7th }
day of December, 1878. }
B. J. DOURAS,
Notary Public,
N. Y. C.

[ENDORSED :]—U. S. Circuit Court, N. Y., Southern District.—Benjamin Urner, Trustee, against Horace B. Claflin *et al.*—Answer.—Vanderpoel, Green & Cuming, Solrs. for Defts.—(Original.)—Tribune Building, New York.—U. S. Circuit Court.—Filed Dec. 9, 1878.—John I. Davenport, Clerk.

(A copy.)

[SEAL.]

JOHN A. SHIELDS,
Clerk.

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Plaintiff's Exhibit Arnold Reissue Docket Entries December 23, 1891, G. F. B., Special Master.

BENJAMIN URNER, Trustee, &c.
vs.
HORACE B. CLAFLIN, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE and DAMIEL ROBINSON. } C. E. Poucher, Jr.

1878.

Sept. 25. Filed Bill and issued subpœna.
Nov. 4. Entd. Appearance of Defts. by Vanderpoel, Green & Cuming.
Dec. 9. Filed Answer.
" 18. Filed Replication.

A copy from Equity Docket " B," p. 874.

[SEAL.]

JOHN A. SHIELDS,
Clerk U. S. Circuit Court,
South. Dist., N. Y.

Statement No. 2.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, as Trustee, vs. H. B. CLAFLIN *et al.* } In Equity.

In pursuance of the orders of the Master herein, the foregoing statement is made by the defendants:

Estimated cost of plaiting for the year 1873		$ 0 00
For the year 1874		657 86
" " " 1875		490 05
" " " 1876		274 24
" " " 1877		664 90
Suits made without plaiting for the year 1878	13,907	
Suits made with plaiting for the year 1878	4,914	
Total number	18,821	

ERRATA.

COLLECTIONS MADE FROM ORIGINAL ON FILE AT CLERK'S OFFICE.

Folio 49. Should be "solicitors for the defendant" instead of "solicitors for defendants."

67. (The witness states) should not be in brackets.

75. Should be "after we stopped using the machines" instead of "after we stopped using the machine."

89. 18 Q. should be "What book among the seven which "you have here" instead of "What book among the "seven you have here."

90. 21 Q. Ans. Should be "keeping an account of the num- "ber" instead of "keeping an account number."

96. 30 Q. Ans. Should be "Claflin" instead of "Claflin."

117. 46 Q. In reference to this question there is a pencil note on original as follows: "By estimate the pro- "portion for 1873 is 103,352 yards."

137. Should be "on behalf of defendants" instead of "on "behalf of defendant."

138. Should be "February 8th" instead of "February "18th."

148. Should be "neither of said suits shall be settled by any "one else" instead of "neither of said suits shall be "settled by any one."

168. 5 Q. In this question the Crosby & Kellogg Patent is referred to in original as No. 37,633 and also as No. 37,033.

171. 9 Q. should read "and goods made by hand" instead of "and goods by hand."

192. 29 Q. Instead of "machine and hand plaitings" should be "machine and hand-made plaitings."

193. 30 Q. Make objection read "* * * and as being "pure hypothesis at best."

195. 31 Q. Answer should be "over the hand-made plait- "ings" instead of "over the hand-made plaiting." Also "while with the hand-made goods" should be "while with hand-made goods."

197. 33 x-Q. Should be "into plaits one-quarter of an inch "wide by hand" instead of "into plaits one-quarter "of an inch by hand."

198. 34 x-Q. Should be "have you ever paid that price" instead of "have you ever paid the price." Also "into plaits one-quarter of an inch by hand" should be "into plaits one-quarter of an inch wide by "hand."

201. 38 x-Q. Answer should read "I had had no experi- "ence in machinery" instead of "I had no experi- "ence in machinery."

215. 2 Q. Should be "How long have you been engaged in "the manufacture of plaitings" instead of "How

"long have you been engaged in the business of "plaitings."

Folio 220. 11 x-Q. Should be "in the manufacturing of rufflings" instead of "in the manufacture of rufflings."

12 x-Q. Answer should read "at that time" instead of "at the time."

220. 13 x-Q. Should be "During the time" instead of "During that time."

227. 21 x-Q. Answer should be "plaitings or rufflings" instead of "plaitings and rufflings."

227. 22 x-Q. Should be "And how long" instead of "How "long."

234. 35 Re-d. Q. Should be "between a ruffle and a plait- "ing" instead of "between a ruffling and a plaiting." 346

237. 41 Re-d. Q. Answer should be "and on the other "kinds" instead of "and on other kinds."

248. 11 Q. Answer should be "to compete in quality" instead of "to complete in quality."

Folio 255 to 268, inclusive, of the record, is not in the original. This is the last hearing before GUTMAN, as Master, held on June 21st, 1889.

272. Should be "and I am by occupation" instead of "and "am by occupation." Also should be "patents and "patented devices" instead of "patent and pat- "ented devices."

276. 2 Q. Answer should read "were to be sewed by the "needle" instead of "could be sewed by the needle."

277. 2 Q. Answer should read "making small crimps or "gathers" instead of "making some of the crimps "or gathers."

278. "Reconstruction of the machine" should be "reconstruction of that machine."

280. "Mechanism and operation" should be "mechanism and operations."

"Idea of mechanism" should be "idea of a mechan- "ism."

296. 9 Q. Ans. should be "crimper or blade" instead of "crimper blade;" "holder or smoother and feeder" should be "holder or smoother."

306. 13 Q. Answer should be "outside the sphere," instead of "outside of the sphere."

316. 24 x-Q. "Yes, by showing the plaits it could," should be "It could."

325. Should be "January 29th," instead of "January 27th."

332. 8 Q. Answer should be "plaiting," instead of "plait- "ings." 347

340. 16 x-Q. Should be "the machines in question," instead of "the machinery in question."

347. 35 x-Q. Should be "Have you any recollection?" instead of "Have any recollection?" Also "the trim- "mings made," instead of "the trimming made."

363. 11 Q. Answer should be "it has been formed," instead of "it had been formed;" "feeding mechanisms,"

instead of "feeding and spacing mechanisms;" "could not be fed without disarranging the plaits," instead of "could not be fed to space them without "disarranging the plaits."

Folio 364. 12 Q. Ans. should be "by this question," instead of "by the question."

368. 14 Q. Ans. should be "backward and forward in a die," instead of "backward and forward in a guide."

371. Should be "at Mr. Wetmore's," instead of "at Mr. "Wetmore's office."

392. 21 Q. Should be "the Crosby and Kellogg Patent held "to be infringed," instead of "the Crosby and Kel-"logg Patent to be infringed."

393. 21 Q. Ans. should be "the Arnold and all the other "devices," instead of "the Arnold and all other de-"vices."

409. 2 x-Q. Ans. Should be "the same as that done on the "machine," instead of "the same as that done by "the machine."

418. 25 x-Q. Ans. Should be "I am willing to deliver them "to a messenger," instead of "I am to deliver them "to a messenger."

421. 19 Q. Should be "or illustrating by a piece of paper" instead of "or illustrate by a piece of paper."

422. Should be "Objection overruled; Exception," instead of "Objection overruled."

442. 3 Q. Should be "Did you receive it from A. E. K.?" instead of "Did you receive it for A. E. K.?"

446. Should be "Defendants," instead of "Defendandts."

448. 3 Q. Should be "roller-plaiting machines," instead of "roller-plaiting machine."

452. Should be "Defendant's counsel," instead of "Desend-ant's counsel."

The hearing before the Master on March 22d, 1890, is left out of record. It follows after folio 468 of record. It is as follows:

MARCH 22D, 1890.

Present—MR. MILLIKEN, for complainant; MR. WETMORE, for defendant.

Mr. Wetmore produces affidavits of Samuel E. Barney and Charles B. Stoughton, which were read and filed on behalf of complainant as a motion for preliminary injunction in this action. Mr. Milliken admits that these affidavits were so read and filed, but objects to their admission on the ground that they are incompetent evidence. Objection overruled. Exception. Marked "Defendant's Exhibit Affi-davits."

Adjourned to 29th inst., at 10:30 A. M., at the office of Wetmore & Jenner.

Folio 469. Should be "B. F. Lee," instead of "B. H. Lee."

472. 2 x-Q. Ans. Should be "from 1857 to 1860-61" instead of "from 1857 to 1860;" also, "as well as of those" instead of "as well as as of those."

477. In original one page is transposed, beginning at "The "extent of these motions was adjustable" (fol. 477 of Record), and ending with "My recollection is that "they did" (fol. 497 of Record, Ans. to 5 x-Q.).

479. 5 x-Q. Ans. Should be "taking on to the side of the "feeding mechanism," instead of "taking on to the "side of the sewing mechanism."

From folio 469 to 488 of record, inclusive, the original is duplicated.

502. 24 x-Q. Should be "so far as the spacing action of a "four-motion feed" instead of "so far as the spac-"ing action of four-motion feed."

509. 31 x-Q. Ans. Should be "and feeding to same extent "as the crimper shoves the goods" instead of "feed-"ing to the same extent that the crimper shoves the "goods."

514. 36 x-Q. Ans. Write "pressure upon the presser-foot," instead of "presser upon the pressure foot."

37 x-Q. Should be "supposed derangement," instead of "supposed derangements."

545. 7 Re-d. Q. Should be "Orr English Patent," instead of "Orr British Patent."

558. 2 Re-x-Q. Should be "the specification of the Crosby "and Kellogg Patent," instead of "the specifications "of the Crosby and Kellogg Patent."

588. 61 x-Q. Should be "Did it have a straight edge?" instead of "Did it have straight edge?"

596. 4 Q. Should be "Are you familiar with that machin-"ery?" instead of "Are you familiar with that class "of machinery?"

597. 7 Q. Should be "if yes," instead of "if yea."

600. 13 Q. Answer should be "sewing machines plaiters," instead of "sewing machine plaiters."

610. Insert at top "New York, June 22d, 1891."

612. "Asabel" should be "Ashbel."

615. 5 Q. Should be "Griffith and Fanning machines put "upon," instead of "Griffith and Fanning machines "put on."

641. 9 Q. Should be "to know the trade requirements," instead of "to show the trade requirements."

656. 30 x-Q. There is no answer to this question, either in the original or record. There was an objection made to the question, but the objection was overruled.

658. 31 x-Q. Should be "to condemn the article as unfit for "sale," instead of "as to condemn the article as un-"fit for sale."

660. 36 x-Q. Should be "Is it your opinion that, from an "artistic point of view," instead of "Is it your opin-"ion from an artistic point of view."

Folio 665. 41 x-Q. Answer should be "I have done but a limited "business," instead of "I have done a limited "business."

674. 50 x-Q. Ans. should be "considerably less money" instead of "considerable less money."

682. 57 Re-d. Q. Ans. should be "cut up a given number of "yards" instead of cut up at a given number of "yards."

683. At the end of Fred A. Kursheedt's examination add:
"Subscribed and sworn to be-
"fore me this 21st day of
"December, A. D. 1891.
"Geo. F. Betts,
"Special Master."

694. 15 Q. should be "twenty-five and fifty cents per yard" instead of "twenty-five and fifty cents a yard."

708. 40 x-Q. in answer write "rufflings" for "ruffling."

716. 52 x-Q. Ans. should be "to-day the effects of laces and "embroideries" instead of "to-day the effects of "laces and embroidery."

727. 73 x-Q. should be "Were all the alpaca dresses trimmed "with plait" instead of "Were all the alpaca "dresses trimmed with plaitings."

752. Should be "calling the witness' attention to the con-"struction" instead of "calling the witness' atten-"tion to construction."

758. 108 Re-x-Q. Ans. should be "as shown on page 18" instead of "as shown on page 13."

763. 114 Re-x-Q. Should be "additional to $5,000," instead of "additional to the $5,000."

766. 117 Re-x-Q. Ans. should be "the machines constantly "being changed and improved" instead of "the "machines were constantly being changed and im-"proved."

768. 119 Re-x-Q. Ans. write "Arnold Patent" instead of "Anold Patent."

771. 121 Re-x-Q. Ans. should be "made in such machines" instead of "made in such machine."

774. 125 Re-x-Q. Should be "done upon the Crosby and "Kellogg machines" instead of "done on the Crosby "& Kellogg machines."

777. 129 R. R. D. Q. Ans. Should be "the sizes we made "the goods," instead of "the sizes we make the "goods."

777. At the end of Alex. E. Kursheedt's examination add:
"Subscribed and sworn to
"before me this 22d day
"of December, A. D. 1891.
"George F. Betts,
"Special Master."

781. 5 Q. Ans. Should be "I throw such stuff as that in the "rags," instead of "I threw such stuff as that in the "rags."

Folio 783. 8 x-Q. At end of answer should be signed " Henry S. " Brown."

794. At end of Henry S. Brown's examination add:

" HENRY S. BROWN.

" Subscribed and sworn to
" before me this 5th day of
" January, A. D. 1892.

" GEORGE F. BETTS,
" Special Master."

Also should be " Adjourned to January 9th " instead of " Adjourned to Tuesday, January 5th."

798. 4 Q. Ans. Should be " Tuttle vs. Claflin " instead of " Tuttle vs. Claffin."

809. Should be " had the machine among other old things " instead of " had a machine among other old things."

811. 16 Q. Ans. Should be " Bias plaited Flouncings " instead of " Biased Plaiting Flouncings."

17 Q. Ans. Should be " I had in my business " instead of " I have had in my business."

819. 30 Q. Should be " admit only of a slower adjustment " instead of " admit of a slower adjustment."

829. 38 x-Q. should be " Do you know whether or not," instead of " Do you remember whether or not."

852. 80 Re-d. Q. should be " the Griffith machine," instead of " the Griffith machines."

862. At end of Geo. H. Wooster's examination add:

" Sworn to before me,

" GEO. F. BETTS,
" Special Master."

865. Immediately following " instead of the Griffith ma- " chine " should be signed " GEO. H. WOOSTER."

868. Should be " pages 307 to 333, inclusive," instead of " pages 307 to 332, inclusive."

872. Should be " for the formation of such folds," instead of " for the formation of such holes."

874. Should be " I do not think that either of the defend- " ant's machines contain the inventions," instead of " I do not think that either of the defendant's ma- " chines contain the invention."

875. Should be " said reissued claims," instead of " the said " reissued claims."

890. Should be " and fold or plait it to an edge," instead of " and fold or print it to an edge."

881. Should be " partly by the action of the crimper blade," instead of " partly by the acting of the crimper " blade."

893. Should be " different portions of the work," instead of " different portions of the wood."

898. 16 Q. Should be " Please state your views," instead of " and state your views."

903. Should be " cloth-pleat," instead of " cloth-plates."

Folio 910. Should be "which parts were useless without such "sewing mechanism," instead of "which parts were "useless with such sewing mechanism."

911. Should be "any sewing mechanism, or any feeding "mechanism, or anything else" instead of "any "sewing mechanism, or anything else."

917. Should be "while the spacer, or spacing instrumen- "tality" instead of "which the spacer, or spacing "instrumentality."

Also should be "whether it be a four-motion feed" instead of "whether it be a four-motion plait."

923. Should be "as expressed in the second and fourth "claims" instead of "as expressed in the fourth "claim."

930. Should be "between the rollers of the defendant's "machines" instead of "between the rollers and "the defendant's machines."

947. At the end of folio 946 should be signed "Henry L. "Brevoort."

948. 32 x-Q. Should be Griffith and Fanning machines" instead of "Griffith and Fanning machine."

Make same correction in answer to same question.

952. 36 x-Q. Ans. Should be "I cannot recollect what I "have heard about it" instead of "I cannot recol- "lect what I heard about it."

956. 40 x-Q. Ans. Should be "pleating blade" instead of "roughening blade."

957. 41 x-Q. Same as previous correction.

957. 41 x-Q. Ans. should be "the Crosby and Kellogg "Patent showed" instead of "the Crosby and "Kellogg showed."

959. 43 x-Q. Should be "that the Crosby and Kellogg Pat- "ent description" instead of "the Crosby descrip- "tion."

43 x-Q. Ans. Should be "and relieve its pressure on "retreating" instead of "and relieve its pressure in "retreat;" also "in view of this description" in- stead of "in view of this distinction."

960. 43 x-Q. Ans. should be "relax its pressure in retreat- "ing," instead of "relaxing its pressure in retreat."

962. 45 x-Q. Should be "would the said enlarged Crosby & "Kellogg machine be as economical," instead of "the said enlarged Crosby & Kellogg would be as "economical.

966. 48 x-Q. Ans. should be "both in the original and the "reissue," instead of "either in the original or the "reissue."

Also, should be "removing the plaits," instead of "removing the plait."

968. 50 Re-d. Q. Should be "using the Griffith and Fan- "ning machines," instead of "using a Griffith and "Fanning machine."

Folio 977. 64 Re-x-Q. Should be "I believe many manufacturers "paid license fees," instead of "I believe many "manufacturers pay license fees."

65 Re-d. Q. Ans. should be "I think the Robjohn "Patent related to guides," instead of "I think the "Robjohn related to guides."

1006. Should be "as we had not room enough," instead of "and we had not room enough."

1011. Should be "A. K. Smith," instead of "A. R. Smith."

1014. Insert at end of this folio the following letter:

"NEW YORK, June 7th, 1892.

"B. F. LEE, ESQ.,
"20 Nassau St., N. Y. City.

"DEAR SIR: I have no further testimony in the "case of Tuttle vs. Claflin. If you have no further "testimony, we can, by consent entered upon the "record, close the case and fix a time for summing "up that will be mutually convenient.

"Yours truly,
"EDMUND WETMORE,
"M."

Complainant's Exhibit Arnold Original Patent.

No. 28,139.

THE UNITED STATES OF AMERICA.

To all to whom these Letters Patent shall come:

Whereas, George B. Arnold, of New York, New York, has alleged that he has invented a new and useful improvement in sewing machines, which he states has not been known or used before such invention; has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said improvement, and that the same hath not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents, praying that a patent may be issued therefor:

These are therefore to grant, according to law, to the said George B. Arnold, his heirs, administrators or assigns, for the term of fourteen years from the eighth day of May, one thousand eight hundred and sixty, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said improvement, a description whereof is given in the schedule hereunto annexed, and made part of these presents.

In testimony whereof, I have caused these letters to be made Patent, and the seal of the Patent Office to be hereunto affixed.

Given under my hand at the City of Washington, this eighth day of May, in the year of our Lord one thousand eight hundred and sixty, and of the Independence of the United States of America the eighty-fourth.

[L. S.]

JACOB THOMPSON,
Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

PHILIP F. THOMAS,
Commissioner of Patents.

Complainant's Exhibit Arnold Disclaimer.

—Jan. 30, 1892, G. F. B.—Special Master.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come :

GREETING :

This is to certify, that the annexed is a true copy from Records of this Office of the Disclaimer, filed May 7, 1874, in the matter of the Letters Patent granted George B. Arnold, May 8, 1860, Number 28,139 for Improvement in Sewing Machines.

In testimony whereof, I, W. E. Simonds, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this 17th day of November, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

W. E. SIMONDS,
[SEAL.] Commissioner.

In the matter of the application of George B. Arnold for Extension of Letters Patent No. 28,139 for Improvement in Sewing Machine.

To the HON. M. D. LEGGETT,
Commissioner of Patents ;

Your petitioner, George B. Arnold of New York City in the State of New York, represents that he is the owner of the Patent issued to him dated May 8, 1860, No. 28,139, for Improvement in Sewing Machine, for and during the Extension thereof, if such shall be extended. He hereby for sufficient reasons, enters his disclaimer to that part of the claim in said specification which is in the following words, to wit : "Third, I claim regulating the fullness of the gathers by varying the relative throw of the feeding devices, substantially as described."

GEO. B. ARNOLD.

New York May 6th, 1874.
Witness, BENJ. URNER.
A. M. P.
E. D. A.

Filed May 7, 1874.

Defendant's Exhibit "Orr Patent."—

G. F. B., Master.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come :

GREETING :

This is to certify, that the annexed is a true copy from the Bound Volume of the Library of this office of the Specification and Drawing in the matter of the English Letters Patent granted James Orr November 4, 1867, Number 3,093 for Improvement in Doubling, Folding, or Plaiting Fabrics.

In testimony whereof, I, C. E. Mitchell, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this 22d day of December, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States the one hundred and fifteenth.

[SEAL.] C. E. MITCHELL,
Commissioner.

A. D. 1867, 4th November, No. 3,093.

Doubling, Folding, or Plaiting Fabrics.

Letters Patent to James Orr, of the City of Glasgow, in the County of Lanark, North Britain, Manufacturer, for the Invention of "*Improvements in Doubling, Folding or Plaiting Woven or other Web Fabrics, and in the Machinery or Apparatus employed therein or connected therewith.*" Sealed the 4th February, 1868, and dated the 4th November, 1867.

Specification in pursuance of the conditions of the Letters Patent, filed by the said James Orr in the Great Seal Patent Office on the 1st May, 1868.

To all to whom these presents shall come, I, James Orr, of the City of Glasgow, in the County of Lanark, North Britain, Manufacturer, send greeting :

WHEREAS, Her Most Excellent Majesty, Queen Victoria, by Her Letters Patent bearing date the Fourth day of November, in the year of our Lord one thousand eight hundred and sixty-seven, in the thirty-first year of Her reign, did for Herself, Her heirs and successors, give and grant unto me, the said James Orr, Her special license that I, the said James Orr, my executors, administrators and assigns or such others as I, the said James Orr, my executors, administrators and assigns, should at any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should and lawfully might make, use, exercise and vend within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, an Invention for "*Improvements in Doubling, Folding or Plaiting. Woven or other Web Fabrics, and in the Machinery or Apparatus*

employed therein or connected therewith," upon the condition (amongst others) that I, the said James Orr, my executors or administrators, by an instrument in writing, under my, or their, or one of their hands and seals, should particularly describe and ascertain the nature of the said Invention and in what manner the same was to be performed, and cause the same to be filed in the Great Seal Patent Office within six calendar months next and immediately after the date of the said Letters Patent.

Now know ye that I, the said James Orr, do hereby declare the nature of my said Invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement in writing, reference being had to the accompanying Drawings and to the letters and numerals marked thereon, that is to say :

My said Invention essentially consists in giving an intermittent forward traverse to the cloth or other textile fabric, in the direction the plaits or folds are doubled over each other, or from the part where they are folded upon or over the surface of a roller, straight plait or table surface, below or between it and a thin or fine edge folding knife blade, or bar, or made to reciprocate in sequential order or equal time with the said intermittent forward traverse, and in the same direction right across the length of the plaits or widths of the fabric to be folded, that is, at the time each forward feeding motion of the fabric stops, the edge of the folding knife is brought forward in the same direction to the extent of its backward traverse, so as to bring forward a corresponding length of the fabric over the surface of the roller or plate below the knife and double up and fold the part in front of the knife over itself in the form of a loop or bow of two thicknesses, and crease and wedge the part of the lower thickness of the doubled cloth above the knife and the thickness carried forward below the knife and held by its edge between the lower feeding roller or table surface and an upper feeding and pressing roller or other equivalent surface, which then catches hold of it and carries the three thicknesses or double folded part forward at the time the folding knife is making its backward traverse for a fresh length of fabric to be clipped or caught, taken up, and folded in like manner.

And in order that my said Invention may be properly understood and performed or put into practice, I will now proceed to describe the several illustrative Figures upon the Sheet of explanatory Drawings, which I have hereunto appended for the purpose of showing the best modifications and means which I am at present aware of for carrying out my said Invention or improvements into practice, the same reference letters and numerals indicating the same or similar parts in all the Figures.

Figures 1, 2, 3 and 4, are respectively a front elevation, plan, transverse section and end view of a folding or plaiting machine constructed in accordance with and illustrative of one modification of my said Invention, mainly constructed for and applicable to the folding or plaiting of strips or widths of muslin, cottons, linens, and other soft, elastic, woven or textile fabrics, which are required to be

thickly or closely folded in parallel plaits lying in one direction and much used for the adorning and trimming of ladies' dresses, and other articles of clothing, but the machine is also susceptible of many simple modifications to make it suit other classes of finished goods and forms and varieties of plaits; Figures 5 and 6 are a transverse section and front elevation of a part of another machine very similar to that shown in Figures 1 to 4, sufficient to show a modification of my said Invention as adapted for laying the parallel rows of folds in reverse directions and so as to produce what is termed a "*box*" plaiting of the fabric by alternately thus reversing its folds while passing through the machine, referring to Figures 1 to 4, this arrangement of mechanism or machine consists of two side standards H strongly screwed or secured to a suitable sole plate B at a proper distance apart to suit the width of fabric to be folded, and when desired, as for a heavier class of machines, these standards may be steadied or attached to each other near the top by a stay or stays, or the standards might be formed or cast in one with the sole plate. The main feeding and lower roller C and upper pressing roller C^1 are mounted to revolve simultaneously in contact so as to catch, press, or smooth and deliver the fabric as it is folded through between them by the action of the toothed wheels C^2 fixed on the ends of their spindles c, c^1 which revolve in bush bearings a fitted into slots formed in the upper and central part of the main standards A, the rollers C C^1, being somewhat longer than the widest piece of fabric to be folded or crimped by the machine. The lower roller C is actuated by preference to the ratchet wheel D keyed on its spindle c by the duplex ratchet pall lever D^1, D^{11}, oscillating loose on the end of the spindle c worked by the stud D^2 in a slot in the lower arm of the lever D^1, directly connected by the eccentric rod to eccentric d^1, fast on the main revolving and driving shaft E, from which the reciprocatory motion of the rollers is derived. Instead of the arrangements of pall lever D^1, D^{11}, D^2, with eccentric and rod d^1 and d for giving the intermittent feed to the rollers C, C^1, from the fast revolving shaft E, any other equivalent mechanism, either actuated by the eccentric or by a cam or crank such as heretofore used for the intermittent turning of spindles of the feeding arrangements of many kinds of machines, as engineers' tools and others may be employed. The first motion shaft E of the machine revolves in bearings formed in brackets A^1 projecting out from the side standards A, actuated by preference by a cord passed over the V grooved pulley E^1 from a similar pulley on an adjacent prime moving shaft for the purpose, not shown in the Drawings, the band being made slack enough to hang loose and not drive the machine except when tightened by a small rolling pulley on the end of a starting and stopping lever placed near the machine. Instead of actuating the driving shaft E by a slack cord and tightening pulley leather it may be worked by a strap and fast and loose pulley past over a pulley on the shaft of the actuated gearing, and it may also be made capable of being driven by the hand or foot by a handle and crank pin projecting laterally from the small fly wheel E^2 on one end of the shaft, by the hand direct or by a connecting rod and treadle arrangement respectively when desired. The driving shaft

E also gives the reciprocating motion to the folding knife blade or bar G by the two eccentrics H, or it might be cams instead of eccentrics to the extent of double the width of the broadest pleat or fold the machine is desired to fold by the two free ends of the two connecting rods H^1 jointed by the studs H^2 in slots in the two vertical oscillating or rocking frames or levers I fulcrumed to the studs at I^1 in arms projecting out in front at the lower part of the side frames A. The folding knife G is jointed by the two end journals G^2 of its strengthening back bar G^1 fixed to the back or thick part of the holding knife G so that its front edge oscillates vertically on two swivel bearing holes in the upper ends of the rocking arms I having the sharp edge of the knife G resting and sliding on the front surface of the lower feeding roller C. The folding knife G oscillates in a nearly horizontal or tangential manner to the part of the periphery of the roller C on which it bears during its reciprocating action with the rocking levers I, which every backward stroke causes its sharp edge to straighten the cloth Z upon the front of the roller ; and every forward stroke to carry it from the extreme back point of the knife's traverse close up to the part where the two rollers C C^1 work or bear close on each other so as to draw in the fabric Z, which is fed in between the roller over the front surface of the lower roller, and below the said sliding sharp edge of the folding knife from the small feeding or supply roller z on which it is previously wound prepared for the purpose, and placed in bearings in the tops of small brackets projecting up from the table on which the machine is fixed, the spindle of the roller z having a pace pulley cord and a weight at y to allow of the fabric being always tight and stretched. The two light springs G^3 rest and slide on the bearing blocks G^4, carried on brackets a'' projecting out in front from the standards A, so as to press the front edge of the knife G down upon the fabric Z, so that during its back stroke it smooths and straightens the cloth Z, and at the turn of its back stroke in going forward it catches and slides the fabric before it, so as to double up the part of the fabric in front of the sharp edge of the knife into a loose bow, and inserts the sharp underfold made by it, with the bow above it and the unfolded thickness below it, tight in below the upper layers of cloth and the upper and lower rollers, the feeding and pressing rollers being standing still at this time ; by the last forward part of the stroke of the knife, which last part of the forward motion or stroke releases the springs G^3 of their resting blocks G^4 and so raise the front part of the knife off the fabric Z, and free it so as to allow it to be caught and carried forward by the rollers which press and hold the three ply of plaited cloth, and carry it forward by the action of the ratchet wheel D and spring pall lever D', D'', and eccentric d' which is so set on the driving shaft E in relation to the eccentrics H so as to take effect just at the time when the folder begins its back stroke, and again stops drawing in the cloth before the folding knife G begins to take up or form the next plait. The swiveling journals G^2 of the knife bar G^1 may oscillate in bushes sliding in slotted or other guides, and either the bushes or the pivots of the bar working in them be reciprocated by two connecting rods and eccentrics direct, or by one when a

double or folk-ended one is connected to the knife bar or to the rocking frame I, when such is used, instead of direct connection to the knife bar. The widths of the plaits are regulated by the shortening of the back traverse of the knife folder, which may be done by the shortening of the eccentric rods to some little extent, which are fitted with right and left handed screw coupling boxes H^{1*}, and to a greater extent by shifting the joint pin H^2, up or down in the slots of the radiating arms I to which the free ends of the eccentric rods H^1, are jointed, or by shortening the throw of the crank pin when that is used instead of an eccentric; or otherwise a strong spring or springs may be fitted so as to bring back the knife bar by its ends or slide bushes, or the rocking frame or levers carrying it respectively, whichever is used, to the maximum length or width of cloth required for the broadest plait, equivalent also to the greatest throw of the eccentrics or cams, which in this case give the positive forward traverse of the knife to double or fold the cloth up to the feeding rollers which catch it; the lesser degree of back traverse necessary for the narrower folds being in this case regulated or given by one or two thumb-screws or small hand eccentric plates against the sliding bushes or frame, or the rocking levers carrying the knife, somewhat in the same manner that the smaller length of stitches are given in the sewing machine from a maximum positive throw of a cam and rod. The length of the forward feed or reciprocating traverse of the feeding rollers during the back stroke of the folding knife, and which regulates the distance between the plates when these are regular, may be regulated by a thumb screw or other equivalent (as just described for regulating that of the folding knife), which thumb screw would regulate the distance that a strong spring would draw back the pall lever D^1, D^{11}, while the fixed throw of the eccentric or cam would always bring the pall lever and ratchet wheel with it up to the fixed point or extreme forward throw of the eccentric or crank, whichever is used; or, as shown in the Drawing, in this case the pin D^2 in the slot of the pall lever D^1 may be shifted, and fixed at any desired point or distance from the fulcrum to give the desired feed motion to the lever I^1 and ratchet wheel D so as to give a motion to the surface of the feeding roller during the back stroke of the folding knife equal to any distance required, less than the greatest throw possible by the eccentric H and shortest point of the lever so as to feed in the fabric to be folded and also deliver it finished at the back end of the machine folded and pressed to the desired size of plaits. The roller spindles are fitted with a spring and screw pressure action a^1, a^2, so as to hold the two rollers tightly together for pressing and glazing the folded fabric when desired, and also hold them firm and stationary all the time the ratchet pall is not acting upon the ratchet wheel D. The desired pressure on the feeding rollers is regulated by the strength of the spring a^1 and the force applied to the pincing screws. Instead of the springs and screws weighted levers when preferred may be applied in a similar manner above the bushes a of the top rollers; and both rollers C, C^1, are in this case polished to give a glossy finish to the plaited goods as delivered; but in some cases the rollers may have devices formed upon them so as to emboss a pattern upon the sur-

face of the plaits, either in addition to or without the smooth polish when desired. When it is desired that the rollers C, C^1, should glaze the plaited goods, as is the case in this machine, it is preferred to heat them in addition to having their surfaces highly polished, as shown in figures 1 and 3; this is preferred to be done by encasing the under surface of the lower roller C, with a close chamber J of sheet metal, the top of which is in close rubbing contact, or nearly so, with the roller C, and is highly heated by the three gas burners J^1, enclosed in inverted hollow bell-shaped cases J^2 covered with fine wire gauze and having air holes at the bottom, which causes a great heating surface flame with little or no smoke, all supplied with common gas by the separate branches j; from the common main pipe j^1, all otherwise in the usual manner of supply. The great heat thus given to the upper part of the vessel J is directly radiated to the roller C and from that to a considerable extent to the upper roller C^1 also; which glazes the goods highly on both sides, and they are therefore delivered in a very good finished state; but, when preferred, they can be further treated in hot calender or glazing rollers, or be further finished by hand dressing and ironing when desired.

Figure 4^a is a diagram edge view of one size of folded or plaited goods, shown a little open and loose, as done with the machine delineated in Figures 1 to 4, with the folds as being all laid in one direction by the one folding blade on the roller surface under it. When irregular spaces are desired between the plaits, a small pattern disk or wheel might be mounted on the spindle close to the ratchet wheel, with notches in its periphery (like the wheel of a clock which regulates the striking hammer), which would allow the ratchet pall to fall into the ratchet teeth in any desired sequence of distances between the plaits; or otherwise, a chain might be made to pass over the small wheel to produce the same effect when a greater range or power was desired than the periphery of the pattern wheel could give. Although the first motion shaft E has been described as a revolving shaft, yet still it will be evident that a reciprocating shaft could be made to perform all the reciprocating movements of the folder and feeding wheel in their reverse sequential order as described; but it would unquestionably be best to give the shaft a circular motion or at least to give it its reciprocatory motion from a revolving prime moving shaft, arranged so that its connecting and actuating mechanism with the shaft E could at once be stopped or set on when the machine was not working right, or set on when desired. When it is desired to compress the inner and under edge or fold of the three ply folds or plaits sharp and "hard" and leave the outer folds soft and round, or elastic and "frill-like" the top feeding roller may be fluted across at the parts corresponding to those where the folds in the fabric are not to be pressed, and left plain at those parts of the roller where the folds are to be compressed; or by another modification, narrow cylindrical pulleys may be made fast to the spindles (working in the bearings a) so as to roll upon each other at any desired distance apart across the width of the fabric to be fed in; and in this case, a vertically acting narrow pressing bar may be employed, brought down at the

proper interval by a lever or levers worked from cams on the first motion shaft E, when the sharp edge of the folder is finishing the inner fold, which would give it the hard sharp fold, and yet leave the outer fold or turn of the plait loose, soft and rounded. Any of these arrangements or modifications of folding, feeding and pressing the folded fabric, may be fitted with a flat polished plate or table set by preference nearly tangentially to the feeding surfaces of the feeding and pressing rollers, or to the periphery of one of these rollers, when only one is used, or tangential to the motion of radial or oscillatory feeding arms when these are used instead of feeding rollers, either above or below a feeding and folding table or smooth plate. When such a table or plate is used the fabric is fed and drawn in over it and under the folding blade or knife, placed rather above the table, with its front folding edge resting on the cloth and plate during its reciprocatory and folding action, all fitted and actuated essentially as described in reference to the foregoing modification of folding on the surface of the feeding roller or pulleys, Figures 1 to 4; and, when desired, this arrangement of folding on a flat plate fed by moving arms, or a disk on a spindle, may be fitted to or upon the feeding table or plate of a sewing machine worked with one, two or more needles, so as to tack or sew the plaits across by rows of stitching during the intervals of feeding forward the folded fabric; and the work so plaited is so regular, that for some classes of work it might be reversed and passed through such a sewing machine with several needles which would stitch along several rows of plaits or folds at the same time; or the work might be passed through a series of embossing and mangling or pressing rollers, ranged on spindles one over the other to suit the width and distances of the plaits or folds, which being all exactly folded would cause the pattern to "register" regularly along the rows of plaits in the work.

Referring to Figures 5 and 6, a second folding blade g is used beneath the first one G, mounted in all respects similarly, to oscillate up and down on the end journals g^2 of its strengthening bar g^1, reciprocating in the upper ends of its rocking levers i; both holding knives G, g, being connected in this case by their connecting rods H^1, h^1, and levers F, f, and actuated by the cams H, h, all respectively keyed on the first motion shaft E. The cams in this case are formed of two semicircular or elliptical grooves (but other equivalent forms of cams may be adopted) in the same radial line across the axis of the shaft E and face of their respective discs, set or keyed with their axis of greatest eccentricity in opposite directions to each other, so that when the cams H draw the knife G in towards its extreme throw towards the rollers C, C^1, the cams h push the knife out towards the extreme outward throw, both as shown in these positions in Figure 5, where they both stand at their extreme positions alternately after having delivered a fold between the rollers, when during that time the feeding rollers are turned by their ratchet wheel D, and spring pall lever arrangement D^1, D^{11}, and connecting rod d, in this case actuated by a crank pin on the face of the pinion d^1 revolving loose on a stud in one of the brackets A^1 carrying the first motion shaft E, which gives motion to the pinion d^1 by

the wheel d^2, having twice the number of teeth contained in the pinion d^1, into which it gears, so as to actuate it at the rate of two revolutions to one of the shaft E. The crank pin in the face of the pinion being so set that it feeds the rollers by the rod d and ratchet lever and wheel arrangement described so as to take up the folded fabric at every half revolution of the shaft E, while each folder G g has inserted its folds and is standing still for a sufficient time to allow the rollers to take up the folded part of the fabric, while the other folder is making the back stroke and the greater part of the front stroke to form the new fold on the standing folder. In this way as the fabric Z is passed from its supply roller z over a guide roller or bar x, so as to pass in between the two folding blades G g to the feeding and pressing rollers the sharp edge of the blade G forms the plait or loop in its forward traverse on the top side laying backwards upon the inside of the other blade g as a sliding plate or surface, while it is held stationary near the rollers C C^1 by the cam h, and the plate g forms the plait in its forward traverse on the underside upon the inside of the plate G, as a sliding surface or plate, while it is similarly held by its cam H, which taking place alternately and being fed in and being pressed or glazed when desired by the hot feeding rollers C C^1, deliver the fabric folded and finished in "box" plaits or folds and in reverse directions on both sides of the fabric as delineated in edge view in the diagram figure 6^a, as it would be formed to a large size in the machine shown in figures 5 and 6. The other parts of this machine being so much the same as that shown and described fully in reference to figures 1 and 4 inclusive I have not considered it necessary to show the whole of the machine in this case or recapitulate the action of the minor parts which are essential to the same as in the first modifications, figures 1, 2, 3 and 4.

Having thus described the nature of my said invention, and the manner of performing the same, I would have it understood that I do not confine or restrict myself to the precise details herein described, as it will be evident to a practical engineer that the same may be altered in form and in the modes of construction without departing from the main or essential features of my said invention, but what I consider to be novel and original and therefore claim as the Invention secured to me by the hereinbefore in part recited Letters Patent is—

First, the general arrangement and construction of mechanism and the parts thereof for the purpose of folding or plaiting and treating fabrics and their use, all substantially in the new or improved manner herein described and shown in the accompanying Drawings or any mere modification thereof.

Second, the adaptation and use of a reciprocating folder or knife upon a roller or an equivalent surface for the purpose of folding or plaiting fabrics up towards a feeder roller or rollers or equivalent removing surface or surfaces, in which both the folder and the feeding surfaces are actuated in sequential time alternately from the same revolving or oscillating shaft or separate shafts, worked from a first common prime moving revolving shaft, all substantially in the new

or improved manner herein described and shown in the accompanying drawings or any mere modification thereof.

Third, the adaptation and use of two plain rollers working on each other in connection with a reciprocating folding knife or knives working on the surface of one of the rollers or on adjacent equivalent surface for the purpose of folding or plaiting fabrics, substantially in the new and improved manner herein described and shown in the accompanying drawings or any mere modifications thereof.

In witness whereof, I the said James Orr, have hereunto set my hand and seal, this thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-eight.

JAMES ORR. (L. S.)

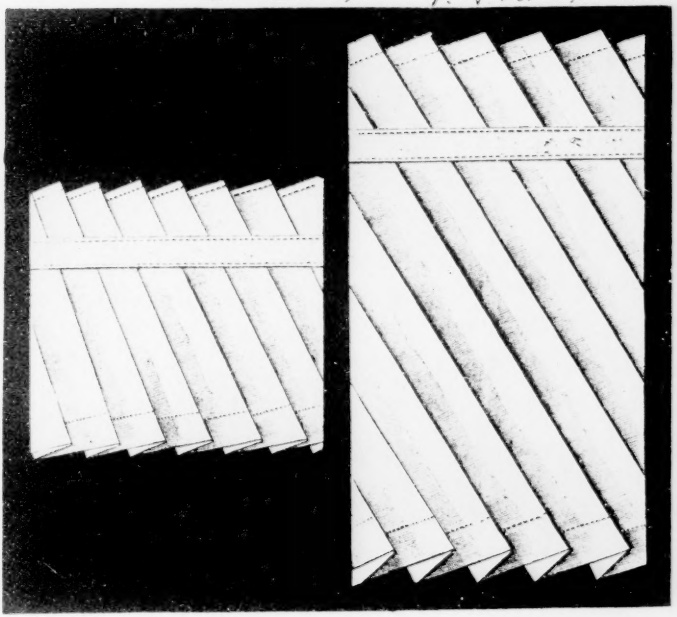
Witness:

W. FREDERICK ROGERS,
19 Salsbury Street,
Strand.

J. F. T.
M. H.

"BIAS PLAITED FLOUNCINGS."

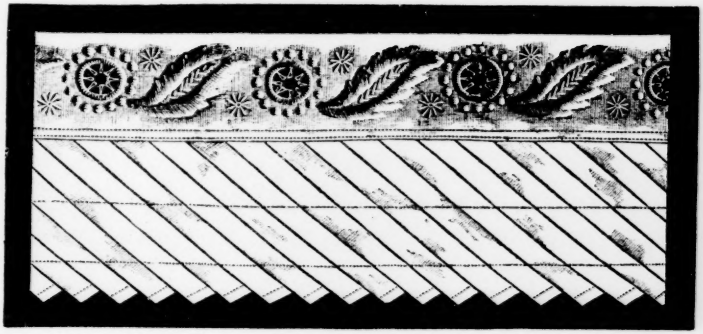
Dec 23 1881 G. & B. Smith Master



No. 1. No. 2.

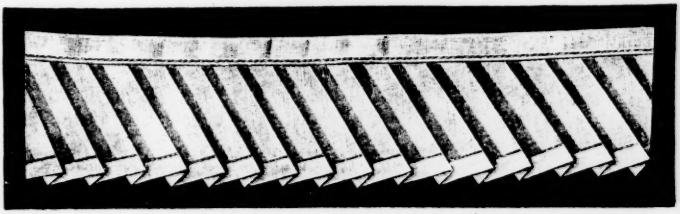
Pfff's Exh. J. E. K. 94a Dec. 23, 1891
G. F. B. Special Master

BIAS PLAITINGS.



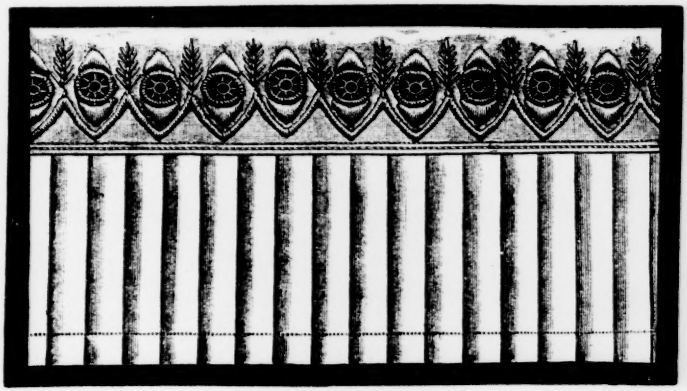
No. 2, BIAS PLAITING, EMBROIDERED.

Pfaff's Exh. A.E.K. 944. Dec. 23. 1891



No. 1. SWISS BIAS PLAITING.

DUPLEX PLAITINGS.



No. 3. DUPLEX PLAITING, EMBROIDERED.

TEN YARD PIECES.

The United States Circuit Court, for the Southern District of New York.

THEODORE A. TUTTLE, Trustee of Elm City Company, Complainant,
AGAINST
HORACE B. CLAFLIN, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE and DANIEL ROBINSON, Defendants.

TO THE HONORABLE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

Humbling complaining, the complainant, Theodore A. Tuttle, Trustee in insolvency of the Elm City Company, shows unto your Honors that at the time of the commencement of this action the complainant was and now is a citizen and resident of the City of New Haven in the State of Connecticut, at which place the said Elm City Company, a corporation duly incorporated under the laws of the State of Connecticut, had its place of business, and that the defendants were copartners doing business in the City and State of New York, and within the Southern District of New York aforesaid under the firm name and style of H. B. Claflin & Co. and the said Horace B. Claflin then and thereafter until the time of his decease was a citizen and resident of the State of New York. That on or about the month of July, one thousand eight hundred and seventy-eight, the complainant above mentioned exhibited his bill of complaint in this Honorable Court against the said defendants praying for certain relief, to wit, that the said defendants might be compelled by a decree of this Honorable Court to account for and pay over unto the complainant, all such gains and profits as have arisen to or been earned and received by the said defendants or to which they might be entitled, and all damages sustained by said complainant by reason of certain unlawful acts of the said defendants in and about the infringements of certain patents in said bill of complaint described, all of which acts, and patents and the averments appertaining thereto are fully stated and described in said bill of complaint, to which the complainant begs leave to refer, as the same is now on file in the office of the Clerk of this Court.

And the complainant further shows that the said defendants, each and all, including the said Horace B. Claflin, having been duly served with process, appeared thereto and thereafter on or about the month of October, 1878, and at the same time interposed their answer to said bill of complaint through their solicitors, Vanderpoel, Green & Cuming, Esqs., wherein and whereby the said defendants deny the equity of the said complainant's bill, or that he is entitled to the relief in said bill prayed.

And such proceedings were thereafter had herein, that on or about the third day of April, 1884, a decree was entered herein in favor of the complainant, and it was referred to Timothy Griffith, Esq., as Master, to take an accounting of said damages and thereafter for the said Timothy Griffith, Esq., Joseph Gutman, Jr., Esq.,

was substituted as Master and said accounting is now pending before said Master.

And the complainant further shows that on or about the fourteenth day of November, one thousand eight hundred and eighty-five, the said Horace B. Claflin, one of the defendants herein, departed this life and published his last will and testament in writing, bearing date the 20th day of July, 1883, and therein and thereby appointed his widow Agnes Claflin, and his two sons John Claflin and Arthur B. Claflin, executrix and executors thereof, and that on or about the 28th day of November, 1885, the said last Will and Testament was duly admitted to probate in the Surrogate's Court, of the City of New York, in the County and State of New York, and the said Agnes Claflin and Arthur B. Claflin having wholly failed and neglected to qualify, and to accept said office, the said John Claflin duly and solely and alone qualified as such executor and took upon himself solely and alone, in due form of law, the burden of the execution of said last will and testament on or about the said 28th day of November, 1885.

And the complainant further shows that the said suit having been abated by the death of the said Horace B. Claflin, the complainant is advised that he is entitled to have the same revived and restored as against the said John Claflin, executor of the last will and testament of Horace B. Claflin, deceased, to the same plight and condition in and at which it was at the time of the death of the said Horace B. Claflin and to have the same relief against him.

To the end therefore that the said John Claflin, as executor of the said Horace B. Claflin, deceased, may answer the premises and that the said suit and proceedings which so became abated as aforesaid may stand revived and be in the same state and condition as the same were in at the time of the death of the said Horace B. Claflin or that the said John Claflin may show good cause to the contrary.

May it please your Honors to grant unto the complainant a writ of subpœna of the United States of America issuing out of and under the seal of this honorable court, directed to the said John Claflin, commanding him on a day certain, therein to be named and under a certain penalty, to be and appear in this honorable Court, and then and there to show cause if any he can why the said suit and the proceedings therein had should not stand and be revived against him as executor of said Horace B. Claflin, deceased, and be in the same condition and state as the same were in at the time of the abatement thereof, and further to stand and abide such order and decree in the premises as to your Honors shall seem meet.

W. T. B. MILLIKEN,
Solicitor for Complainant,
237 Broadway,
New York City.

[ENDORSED:] U. S. Circuit Court, Southern District of New York.—Theodore A. Tuttle, as Trustee, &c., against Horace B. Claflin and others.—Bill of Revivor.—W. T. B. Milliken, Solicitor

for Complainant, 237 Broadway, New York City.—U. S. Circuit Court, Filed Sep. 12, 1889, John A. Shields, Clerk.

U. S. Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, &c.,
AGAINST
HORACE B. CLAFLIN and others.

On reading the bill of revivor herein filed on the 12th day of September, 1889, and the præcipe filed herein on the said 12th day of September, 1889, and it appearing by the return of the U. S. Marshal thereon endorsed that the same was duly served the 14th day of September, 1889, on John Claflin therein named, which said præcipe was returnable on the 7th day of October, 1889, being a rule day, more than fourteen days after said service, and it also appearing that notice of the proceeding and the day of the return aforesaid was duly given to Vanderpoel, Green & Cuming, defendants' solicitors, and to Edmund Wetmore, of counsel for defendants, and no one appearing on said return day for any of the defendants, nor for said John Claflin, it is

Ordered, that the prayer of said bill of revivor be and the same hereby is granted, and that the said suit be and hereby is revived and the name of the said John Claflin as executor is substituted for the name of said defendant Horace B. Claflin.

Foregoing rule entered in Equity Rule Book, Clerk's office U. S. C. C., as of Oct. 8, '89.

At a Stated Term of the Circuit Court of the United States, held in and for the Southern District of New York, at the Court House, in the City of New York, on the 2d day of December, 1889.

Present—Hon. E. HENRY LACOMBE, Judge.

THEODORE A. TUTTLE, as Trustee of ELM CITY COMPANY,
Complainant,
AGAINST
JOHN CLAFLIN, as Executor of HORACE B. CLAFLIN, deceased, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER FORCE and DANIEL ROBINSON, Defendants. — In Equity.

On the annexed stipulation of the solicitors of the respective parties to the above-entitled suit, it is

Ordered, that the name of William S. Dunn be stricken from the title of said suit in all the proceedings heretofore had and hereafter to be had herein, and that said suit may proceed in all respects in the same manner and with the same effect as if the said William S. Dunn had never been a necessary or proper party to said suit, and that the omission of the said William S. Dunn and of the representatives of said William S. Dunn from the proceedings herein shall

not be taken or deemed to be a defect of parties herein, and the said William S. Dunn and his representatives shall not be deemed a necessary or proper party or parties herein for any purpose whatever, and that said suit shall not be taken or deemed to have abated or to have been abated for any purpose whatever by reason of the death of said William S. Dunn.

E. HENRY LACOMBE.

United States Circuit Court, for the Southern District of New York.

THEODORE A. TUTTLE, as Trustee of ELM CITY COMPANY, Complainant, AGAINST JOHN CLAFLIN, as Executor of HORACE B. CLAFLIN, deceased, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, WILLIAM S. DUNN, DEXTER N. FORCE and DANIEL ROBINSON, Defendants.	In Equity.

It is hereby stipulated and agreed by and between the respective parties in and to the above-entitled suit that the name of William S. Dunn, who recently departed this life, be stricken from the title of said suit, in all proceedings heretofore had and hereafter to be had herein, and that said suit may proceed in all respects in the same manner and with the same effect as if the said William S. Dunn had never been a necessary or proper party to said suit, and that the omission of said William S. Dunn, and of the representatives of said Dunn, from the proceedings herein, shall not be taken or deemed to be a defect of parties herein, and the said William S. Dunn and his representatives shall not be deemed a necessary or proper party or parties herein for any purpose whatever, and that said suit shall not be taken or deemed to have abated, or to have been abated, for any purpose whatever, by reason of the death of said Dunn. And it is further stipulated and agreed that an order to that effect may be entered herein.

CHARLES W. GOULD,
Solicitor for Deft.
W. T. B. MILLIKEN,
Solicitor for Complainant,
237 Broadway,
New York City.

[ENDORSED :]—United States Circuit Court, Southern District of New York.—Theodore A. Tuttle, Trustee, etc., agst. John Claflin, as Executor, &c., and others.—Stipulation and Order as to William S. Dunn, Defendant.—W. T. B. Milliken, Solicitor for Complainant, 237 Broadway, New York City.—U. S. Circuit Court.—Filed Dec. 2, 1889.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee,
vs.
JOHN CLAFLIN, as Executor, etc., *et al.*

ON EXCEPTIONS TO MASTER'S REPORT.

BENJAMIN F. LEE, for the complainant.
EDMUND WETMORE, for the defendants.

COXE, J.:

This action is based on Letters Patent No. 37,033 granted to Crosby & Kellogg, December 2, 1862, for an improvement in machines for frilling and crimping. The bill was filed August 1, 1878, fifteen years and eight months after the date of the patent. In March, 1884, the patent was sustained by this Court (*Tuttle* v. *Claflin*, *18 Fed. Rep.*, *599*), and the second and fourth claims were held to be valid and infringed. These claims are as follows:

"2. In combination, a crimper and a smoother substantially such as described and acting substantially as specified, to hold the crimps to an edge.

"4. In combination with a crimper substantially such as specified, a spring acting to force said crimper upon the goods while crimping them and relaxing its pressure while the crimper is retreating, substantially in the manner and for the purpose specified."

The second claim is the broader of the two, the fourth claim being for a more limited combination.

On the 24th of August, 1893, the Master who took the accounting filed his report in which he found no damages against the defendants, but reported the sum of $76,215.85 "as the profits, gains and advantages which the said defendants had derived, received or become entitled to by reason of their infringement."

The Master proceeded upon the theory that the entire profits of the large roller-plaiting machines used by the defendants was due to the combinations of the claims just quoted and that the defendants had saved the difference between one-half a cent a yard, the cost when the machines were used, and the cost of making the same number of yards by hand, which was estimated to be 15 cents per yard for linen plaitings and 25 cents per yard for woolen plaitings. In other words, that it cost the defendants $2,419.55 to plait 483,910 yards of goods on the machines; that if they had not used the machines they would have had the same number of yards plaited by hand at a cost of $78,635.40, and that they had, therefore, saved the difference ($76,215.85) and should pay it to the complainant.

The comparison was not with the next best trimming, but with the same trimming made in the next best way, or in the way which the Master found to be the next best.

On the 26th of August, 1893, the defendants filed exceptions disputing the correctness to all the master's conclusions as to the

profits derived by them. The exceptions present several questions of minor importance, the broad, fundamental question being, whether the complainant is entitled to recover $76,215.85 as profits from the defendants.

The testimony establishes two propositions. *First*, the combinations of the second and fourth claims of the Crosby & Kellogg patent would not produce the finished product of the infringing machines used by the defendants, and, *second*, if machines and product were identical, the comparison instituted by the master between the cost of making the plaitings by defendants' machines and the cost of making them by hand was not, upon the facts of this case, the proper rule of computation.

The invention is an ingenious device, designed originally for a sewing machine attachment and intended to do the same general character of work as the Arnold ruffler, but it was distinctly an advance over the Arnold machine. It is entirely clear, however, that the mechanisms covered by the second and fourth claims did not and could not produce a commercial plaiting like those made on the defendants' machines, viz: a spaced and ironed wide plaiting ready for use as a trimming for ladies' gowns. The defendants' machines took the frills produced by the combinations of the claims and by making the plaits uniform and ironing them down originated something which caught the market and produced the demand.

In 1867, James Orr, of Glasgow, invented a roller-plaiting machine which seems to have created the demand for trimmings of this kind.

At least there is no satisfactory proof that for six years, and more, after the Crosby & Kellogg invention, their machine as patented, ever did or ever could make a yard of trimming like that made by the defendants' machine. It was to these machines organized and perfected long after the Crosby & Kellogg invention, and containing as they did the condensed ingenuity of several prior structures that the art was indebted for the trimming so fashionable during the period in question. Surely the features added to the machine by Orr, Griffith and Fanning, and particularly the ironing feature by which a perfect symmetrical finish is imparted to the plaitings, must have contributed something to their value. To assert that the whole value is due to the Crosby & Kellogg invention is erroneous.

The complainant is not entitled to appropriate the additional value imparted to the plaitings by those features of the infringing machines not found in the second and fourth claims.

But assuming that the machines used by the defendants were precisely the machines of the claims and nothing more, still the comparison instituted by the master between the cost of plaitings made on them and the cost of hand-made plaitings, was, it is thought, founded upon mistaken premises.

The punishment inflicted upon the defendants is out of all proportion to their fault. They have been adjudged to pay a very large sum of money upon the theory that they have made that sum, or saved that sum, by the use of the complainant's machine. The proof fails to satisfy the Court of the soundness of this view.

Assuming, as we must, that the defendants would have acted in accordance with the ordinary rules which govern human conduct, it is hardly probable that they would have ordered nearly half a million yards of plaitings at such a ruinous cost. Surely there is no presumption that they would have done so. The witness best fitted to speak on this subject, the defendant's superintendent, says that they would not. The presumption was greater that the defendants would have given up the use of this trimming altogether, or would have adopted some substitute, rather than that they would have resorted to a method which common sense would reject both because of its enormous expense and also because of its inefficiency. Not only were plaitings made by hand too expensive but they were so poorly done that it is doubtful whether the defendants could have used them at any price in competition with the machine-made plaitings. If this were an art in which hand-made plaitings had been used before to any appreciable degree as articles of commerce, and machine-made plaitings had superseded them, there would be more reason for asserting that the defendants would have continued to use the old method if they were prevented from adopting the new. But here there was no old method. The Crosby and Kellogg machine had been in existence for six years and had created no demand for kilt plaitings. Such plaitings could, of course, be made by hand, but the process was tedious and expensive and the product inferior and unmerchantable. It is fair to say that, in a commercial sense, kilt plaitings were not made by hand prior to the introduction of the roller-plaiting machines. The infringing machines made the demand. They created the market. There is nothing but conjecture to show that the defendants would have resorted to the hand-made method. First, it was so expensive as to be practically prohibitory, and second, it was impossible to make a marketable plaiting by hand—one that could compete successfully with the machine-made plaitings.

But the matter should not be left to presumption. The burden was upon the complainant to establish the affirmative of both these propositions. First, that the profits were entirely due to the combination of the claims, and second, that the cost price of hand-made plaitings was a fair measure of comparison. He has done neither.

Various illustrations will occur to any one familiar with patents where ingenious labor-saving machines have created an art which otherwise would not have existed. Take the paper bag industry, for instance. Is it a fair assumption that a manufacturer who found himself precluded from using the patented machines which turn out bags by the thousands, would attempt to supply the market with hand-made bags? A machine will sometimes make in a second an article which never was made before and which can be made by hand only after hours of painstaking toil by a skilled artisan. The machine will supply hundreds of millions of these articles annually to commerce at a merely nominal price. To make the same articles by hand, though physically and experimentally possible, is practically and commercially out of the question. The time, labor and money required would preclude such an attempt. An article costing a dollar cannot compete successfully with a better article costing a mill, and no rational being would attempt such a competition. And

yet if the doctrine of the report is pushed to its logical conclusion the owners of the patents for comparatively unimportant inventions will be able to levy an enormous tribute upon infringers resulting in fabulous but unmerited wealth to the former and bankruptcy to the latter.

With the highest respect for the opinion of the learned Master, the Court is unable to agree with the conclusions reached by him.

The exceptions, so far as they relate to the questions discussed, must be sustained.

NOTE.—I have not attempted to make any suggestions regarding the future disposition of this cause, for the reason that it occurs to me that an order merely sustaining the exceptions will enable the complainant in the most satisfactory way to present the questions involved to the Circuit Court of Appeals. Should the complainant desire to have the cause sent back to the Master, that course will be adopted.

[ENDORSED:] United States Circuit Court, Southern District of New York—Theodore A. Tuttle *vs.* John Claflin, as Executor, *et al.*—Decision.—COXE, J.—U. S. Circuit Court.—Filed March 15, 1894.—John A. Shields, Clerk.

At a Stated Term of the United States Circuit Court, for the Southern District of New York, held on the 10th day of April, 1894.

Present—Hon. ALFRED C. COXE, J.

THEODORE A. TUTTLE, Trustee in Insolvency of the ELM CITY COMPANY, Complainant,

vs.

JOHN CLAFLIN, as Executor of the Last Will and Testament of HORACE B. CLAFLIN, deceased, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE and DANIEL ROBINSON, Defendants.

The exceptions filed on the 26th day of August, 1893, on the part of the defendants to the Master's report herein, by which report the sum of $76,215.85 was reported by the Master as the profits derived by the defendants by reason of their infringement of the Letters Patent upon which this suit is brought, coming on to be heard at the October session of this Court, and being argued by Counsel, and it appearing to me by the testimony taken before the Master that the combination of the second and fourth claims of the Crosby and Kellogg patent, upon which this suit is brought, could not produce the finished product of the infringing machines used by the defendants, and that even if the said combinations could produce the finished products of the said infringing machines the comparison instituted by the Master between the cost of making the plaitings by defendants' machines and the cost of making them by hand was not upon the facts of this case

a proper method of computation of profits; thereupon, upon consideration thereof, it is

Ordered and decreed that the said exceptions, so far as they relate to said questions, especially the *eleventh*, *twelfth*, *seventeenth*, *eighteenth* and *twentieth* exceptions be, and the same are hereby, sustained and that the said report be, and hereby is, set aside; and it is further

Ordered and decreed that the complainant may, if he desires, have the cause sent back to the Master for further proofs, and for a further report thereon, such election to be expressed by a notice in writing to be filed with the Clerk of this Court within sixty days after the entry of this decree. That in default of such notice, the complainant recover of the defendants the sum of six cents damages, and that the complainant recover of the defendants his costs to be taxed for all proceedings prior to and including the order of reference made herein on the day of March, 1884, and that the costs of the proceedings thus far had before the Master herein be taxed in favor of the defendants.

ALFRED C. COXE,
U. S. J.

[ENDORSED:]—U. S. Circuit Court, Southern District of New York.—Theodore A. Tuttle, Trustee, &c., *v.* John Claflin, as Executor, *et al.*—ORDER.—Charles W. Gould, Solicitor for Defendant, 45 William St., New York.—U. S. Circuit Court.—Filed April 10, 1894, John A. Shields, Clerk.

At a Stated Term of the United States Circuit Court, for the Southern District of New York, held on the 5th day of June, 1894.

Present—Hon. ALFRED C. COXE, Judge.

THEODORE A. TUTTLE, Trustee, etc.
VERSUS
JOHN CLAFLIN, as Executor, etc., *et al.*

It is ordered and decreed that the decree made herein on the 10th day of April, 1894, be and the same is hereby modified as follows: by striking out the words "within sixty days after the entry of this decree," and inserting in lieu thereof, "on or before the second day of July, 1894."

ALFRED C. COXE,
U. S. J.

[ENDORSED:]—United States Circuit Court, Southern District of New York.—Theodore A. Tuttle, Trustee, etc., versus John Claflin, as Executor, etc., *et al.*—Order modifying decree.—Copy delivered 4th day of June, 1894, at offices of Wetmore & Jenner, Edmund Wetmore, per Henry Opdyke.—U. S. Circuit Court.—Filed Jun. 6, 1894.—John A. Shields, Clerk.

At a Stated Term of the United States Circuit Court, for the Southern District of New York, held on the 30th day of June, 1894.

Present—Hon. Alfred C. Coxe, Judge.

Theodore A. Tuttle, Trustee, etc.,
versus
John Claflin, as Executor, etc., *et al.*

It is ordered and decreed, that the decree made herein on the 10th day of April, 1894, and modified by the orders made herein on the 5th day of June, 1894, be and the same is hereby further modified as follows: by striking out the words, "on or before the second day of July, 1894," and inserting in lieu thereof, "on or before the 20th day of August, 1894."

Alfred C. Coxe,
U. S. J.

[Endorsements.]

United States Circuit Court,
Southern District of New York.
Theodore A. Tuttle, Trustee, etc.
versus
John Claflin, as Executors, etc., *et al.*
Order Modifying Decree.
I consent to entry within order.
Edmund Wetmore.
United States Circuit Court filed July 2nd, 1894.
John A. Shields, Clerk.

At a Stated Term of the United States Circuit Court for the Southern District of New York, held on the 24th day of August, 1894.

Present—Hon. Alfred C. Coxe, Judge.

Theodore A. Tuttle, Trustee, etc.,
versus
John Claflin, as Executor, etc., *et al.*

It is ordered and decreed that the decree made herein on the 10th day of April, 1894, and modified by the orders made herein on the 5th day of June, 1894, and on the 30th day of June, 1894, be and the same is hereby further modified as follows:—by striking out the words "on or before the 20th day of August, 1894," and inserting in lieu thereof "on or before the 20th day of September, 1894."

It is further ordered that this order be entered as of August 20, 1894.

Alfred C. Coxe,
U. S. J.

[Endorsed:]—United States Circuit Court, Southern District of New York.—Theodore A. Tuttle, Trustee, etc., versus John Claflin,

as Executor, etc., *et al.*—Order modifying Decree.—B. F. Lee, of Counsel.—I consent to entry of within order, as of August 10th, 1894. Edmund Wetmore, for Plaintiff.—U. S. Circuit Court.—Filed Aug. 25, 1894. John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee in insolvency of the ELM CITY COMPANY, Complainant and Appellant,
VERSUS
JOHN CLAFLIN, as Executor of the Last Will and Testament of HORACE B. CLAFLIN, deceased; JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE and DANIEL ROBINSON, Defendants and Appellees. } In Equity.

In pursuance of and obedient to Rule 11, formulated and adopted by the United States Circuit Court of Appeals for the Second Circuit, the above-named complainant and appellant respectfully makes the following assignment of errors in the above-entitled cause, to wit:

That the Court erred, first, in that the Court did not confirm the report of George F. Betts, Esq. Master, filed on or about the 26th day of August, 1893; second, in that the Court did not order, adjudge and decree that the complainant recover of the defendants the sum of $76,215.85, with interest thereon from the date of the filing of said report of George F. Betts, Esq., Master; third, in that the Court did not order, adjudge and decree, that the complainant recover of the defendants at least the sum of $70,000; fourth, in that the Court did not order, adjudge and decree, that the complainant recover of the defendants at least the sum of $60,000; fifth, in that the Court did not order, adjudge and decree that the complainant recover of the defendants at least the sum of $50,000; sixth, in that the Court did not order, adjudge and decree that the complainant recover of the defendants at least the sum of $40,000; seventh, in that the Court did not order, adjudge and decree that the complainant recover of the defendants at least the sum of $30,000; eighth, in that the Court did not order, adjudge and decree that the complainant recover of the defendants at least the sum of $20,000; ninth, in that the Court did not order, adjudge and decree that the complainant recover of the defendants at least the sum of $10,000; tenth, in that the Court did not order, adjudge and decree that complainant recover any amount whatsoever as profits that had accrued to or had been received by the defendants from infringing the letters patents for infringement of which this suit was brought; eleventh, in that the Court did not order, adjudge and decree that the complainant recover of the defendants his costs herein to be taxed in all the proceedings had in this suit; twelfth, in that the Court sustained exceptions filed by the defendants to the said report of George F. Betts, Esq., Master, and did not overrule the same; thirteenth, in that the Court sustained the exception numbered eleven of the defendants to the report of George F. Betts, Esq., Master, and did not overrule the same; fourteenth, in that the Court

sustained the exception numbered twelve of the defendants to the report of George F. Betts, Esq., Master, and did not overrule the same; fifteenth, in that the Court sustained the exception numbered seventeen of the defendants to the report of George F. Betts, Esq., Master, and did not overrule the same; sixteenth, in that the Court sustained the exception numbered eighteen of the defendants to the report of George F. Betts, Esq., Master, and did not overrule the same; seventeenth, in that the Court sustained the exception numbered twenty of the defendants to the report of George F. Betts, Esq., Master, and did not overrule the same; eighteenth, in that the Court ordered and decreed that the complainant recover of the defendants the sum of six cents damages, and did not order and decree that the complainant recover a sum in excess of that amount; nineteenth, in that the Court ordered and decreed that the costs of proceedings had before the masters herein be taxed in favor of the defendants; twentieth, in that the Court held that the combinations of the second and fourth claims of the Crosby & Kellogg patent, upon which this suit was brought, could not produce the finished product of the infringing machines used by the defendants, and did not hold that such combinations could produce the finished product of said infringing machines; twenty-first, in that the Court held that even if the said combinations could produce the finished products of the said infringing machines, the comparison instituted by the Master between the cost of making the plaitings by defendant's machines and the cost of making them by hand was not, upon the facts of this case, a proper method of computation of profits, and in that the Court did not hold that such method of computation of profits was proper.

W. T. B. MILLIKEN,
Solicitor for Complainant and Appellant.

B. F. LEE,
Of Counsel.

[ENDORSED:]—U. S. Circuit Court, Southern Dist. of New York.—Theodore A. Tuttle, Trustee, &c., *v.* John Claflin, as Executor, &c., *et al.*—Assignment of Errors.—U. S. Circuit Court, Filed Oct. 5, 1894, John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee in Insolvency of the ELM CITY COMPANY, Complainant and Appellant,
vs.
JOHN CLAFLIN, as Executor of the last Will and Testament of HORACE B. CLAFLIN, deceased, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE and DANIEL ROBINSON, Defendants and Appellees.

Bond for Costs. In Equity.

Know all men by these presents, that I, George H. Wooster, of the City of New York, am held and firmly bound to the abovenamed John Claflin as executor of the last will and testament of

Horace B. Claflin, deceased, John Claflin, Edward E. Eames, Horace J. Fairchild, Dexter N. Force and Daniel Robinson, defendants, in the sum of one thousand dollars, to be paid to the said defendants, for the payment of which well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents.

Sealed with my seal, dated the fifth day of October, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas, the above-named Theodore A. Tuttle, as Trustee in insolvency of the Elm City Company, has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit to correct and reverse the decree rendered in the above-entitled suit by the Judge of the Circuit Court of the United States, for the Southern District of New York.

Now therefore, the condition of this obligation is such, that if the above-named Theodore A. Tuttle, as Trustee, as aforesaid, shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make his appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

In witness whereof, I have hereunto set my hand and seal this fifth day of October, 1894.

GEO. H. WOOSTER [SEAL.].

STATE OF NEW YORK,
Southern District of New York, } ss. :
City and County of New York,

GEORGE H. WOOSTER, being duly sworn, deposes and says: I reside in the City and County of New York, and am a freeholder and householder therein, and am worth the sum of two thousand dollars and upwards over and above all debts and liabilities and property exempt from sale on execution.

GEO. H. WOOSTER [SEAL.].

Sworn to before me this 5th
day of October, 1894.

HOWARD THAYER KINGSBURY,
[SEAL.] Notary Public,
N. Y. Co.

STATE OF NEW YORK,
Southern District of New York, } ss. :
City and County of New York,

On this fifth day of October, 1894, at the City of New York aforesaid, before me, a notary public in and for said city and county, personally appeared George H. Wooster, to me known, and known to me to be the individual described in and who executed the foregoing bond, and duly acknowledged to me that he had executed the same.

HOWARD THAYER KINGSBURY,
[SEAL.] Notary Public,
N. Y. Co.

[Endorsed:]—U. S. Circuit Court, Southern Dist. of New York.—Theodore A. Tuttle, Trustee, &c., *vs.* John Claflin, as executor, &c., *et al.*—Bond.—Approved Oct. 5, 1894.—E. H. Lacombe, U. S. Circuit Judge.—U. S. Circuit Court.—Filed Oct. 5, 1894.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee in Insolvency of the ELM CITY COMPANY, Complainant and Appellant,
VERSUS
JOHN CLAFLIN, as Executor of the last Will and Testament of HORACE B. CLAFLIN, deceased, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE, and DANIEL ROBINSON, Defendants and Appellees. } In Equity.

STATE, CITY AND COUNTY OF NEW YORK, } ss. :
Southern District of New York. }

HUMPHREY Y. CUMMINS, being duly sworn, says that he resides in the City of Brooklyn, Kings County, and is of full age. That on the 6th day of October, 1894, he served the annexed appeal, allowance and citation upon John Claflin, as executor of the last will and testament of Horace B. Claflin, deceased, John Claflin, Edward E Eames, Horace J. Fairchild, Dexter N. Force and Daniel Robinson, defendants in the above suit, at No. 224 Church street, in the City of New York, between the hours of 10:30 and 11:30 in the forenoon, by exhibiting to each of them severally the said original appeal, allowance and citation, and delivering to and leaving with each of them personally a copy of the same.

Deponent further says that he knew the said individuals so served by him as aforesaid to be the same John Claflin, as executor of the last will and testament of Horace B. Claflin, deceased, John Claflin, Edward E. Eames, Horace J. Fairchild, Dexter N. Force and Daniel Robinson, mentioned and described in the said appeal and citation as the defendants and appellees therein.

HUMPHREY Y. CUMMINS.

Sworn to before me this 6th }
day of October, 1894. }
R. A. PIPER,
[SEAL.] Notary Public,
Kings County.

Certificate filed in New York County.

U. S. Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, etc.
VERSUS
JOHN CLAFLIN, as Executor, etc., *et al.*

STATE, CITY AND COUNTY OF NEW YORK, Southern District of New York, ss.:

HOWARD THAYER KINGSBURY, being duly sworn, says: That he is of full age and resides in the City of New York; that on Friday, the fifth day of October, 1894, between the hours of three and four o'clock in the afternoon, he served upon Charles W. Gould, defendant's solicitor herein, at his office, No. 2 Wall street, in the City of New York, the annexed appeal, allowance and citation, by showing the said original appeal, allowance and citation to a person in charge of said office, and delivering to him a copy of the same, the said Charles W. Gould being absent from his office at the time.

HOWARD THAYER KINGSBURY.

Sworn to before me this 6th day of October, 1894.

R. A. PIPER,
[SEAL.] Notary Public,
Kings County.

Certificate filed in New York County.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee in Insolvency of the ELM CITY COMPANY, Complainant and Appellant,
VERSUS
JOHN CLAFLIN, as Executor of the last Will and Testament of HORACE B. CLAFLIN, deceased, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE and DANIEL ROBINSON, Defendants and Appellees. } In Equity.

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

The appeal of the above-named complainant and appellant respectfully showeth:

That upon the first day of August, 1878, the above-named complainant and appellant, Theodore A. Tuttle, as trustee in insolvency of the Elm City Company, filed his bill in the Circuit Court of the United States for the Southern District of New York, against Horace B. Claflin, John Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force and Daniel Robinson, defendants in a suit in equity, alleging that said defendants had infringed the rights of the complainant therein, secured to him as assignee of letters patent granted and issued on the second day of December, 1862, to Chauncey O. Crosby and Henry Kellogg, and numbered 37,033, for certain new and useful improvements in machines for producing folded trimmings, and praying for an accounting and payment to

the complainant by said defendants of the profits by them realized, and of the damages suffered by said complainant by reason of said infringement of said letters patent, and also that writs of subpœna and of injunction might be issued against the said defendants.

Complainant and appellant further shows, that thereafter and on the 6th day of September, 1878, the said defendants duly appeared in said Court and filed their appearance therein by counsel.

And this complainant and appellant further shows that thereafter and on the 7th day of October, 1878, the said defendants filed their answer to the said bill. That a general replication was filed on the 20th day of December, 1878, and issue being thus joined, and due notice being given, testimony was duly taken and filed, and such proceedings were had that on the 10th day of March, 1884, a decision was rendered by his Honor Judge Wallace sustaining the bill and adjudging infringement of the second and fourth claims of said patent, and accordingly, on the 3rd day of April, 1884, a decree was entered for an accounting and assessment of damages, and the cause was referred to Timothy Griffiths, Esq., for such accounting and assessment. Thereafter, and on the 13th day of February, 1889, an order was entered on consent, appointing Joseph Gutman, Jr., Esq., as Master, in the place and stead of said Timothy Griffith.

And this complainant and appellant further shows that thereafter this cause was abated by reason of the death of Horace B. Claflin, one of the defendants, and that thereafter, and on the 12th day of September, 1889, this complainant filed his bill of revivor against John Claflin, as Executor of the Last Will and Testament of Horace B. Claflin, deceased, and the other defendants heretofore named, and by order entered October 8th, 1889, this cause was so revived in the same condition and state as it stood at the death of the said Horace B. Claflin, and thereafter, and on the 12th day of November, 1889, the said defendant John Claflin, as Executor as aforesaid, appeared herein, as solicitor. That thereafter, and by order of November 15th, 1889, George F. Betts, Esq., was substituted as Master in place and stead of Joseph Gutman, Jr. That thereafter, and by order entered on the 2nd day of December, 1889, the name of William S. Dunn was stricken out as party defendant.

And this complainant and appellant further shows that the accounting proceeded before the said Master, and such proceedings were had that on the 26th day of August, 1893, George F. Betts, Esq., Special Master, filed his report, dated the 24th day of August, 1893, awarding $76,215.85 profits to this complainant. That on the 23rd day of September, 1893, the defendants herein made and filed certain exceptions to the said report of the said Master. That the said exceptions coming on to be heard, a decision was rendered on the 15th day of March, 1894, by his Honor, Judge Coxe, sustaining said exceptions, upon which on the 10th day of April, 1894, a decree was entered sustaining the said exceptions so far as they relate to the questions whether the combinations of the second and fourth claims of the Crosby and Kellogg patent, upon which this suit was brought, could, or could not produce the finished product of the infringing machines used by the defendants, and whether, if the said

combinations could produce the finished products of the said infringing machines, the comparison instituted by the Master between the cost of making the plaitings by defendants' machines and the cost of making them by hand, was, or was not a proper method of computation of profit, said exceptions being especially those numbered 11, 12, 17, 18 and 20. That it was further ordered and decreed, that the complainant recover of the defendants the sum of six cents damages, and that the complainant recover of the defendants his costs, to be taxed, for all proceedings prior to and including the order of reference made herein on the 3d day of April, 1884, and that the costs of the proceedings thus far had before the Masters herein be taxed in favor of the defendants.

Wherefore, this appellant appeals from the whole of said last mentioned decree of said Circuit Court of the United States for the Southern District of New York, to the United States Circuit Court of Appeals for the Second Circuit (except from so much thereof as adjudges and decrees, or recognizes, that the second and fourth claims of said Letters Patent are valid, and that the defendants have infringed the same, and that the complainant is entitled to an accounting of the profits which have accrued to the defendants or which have been received by them from such infringement, and also to an accounting of damages which have been sustained by complainant from such infringement, and to the recovery of such profits and damages from the defendants, and which awards certain costs to the complainant), and respectfully prays that the decree of said Circuit Court together with the bill of complaint, replication, pleadings, depositions, evidence, exhibits, Master's Report, exceptions and proceedings in said cause may be sent to the United States Circuit Court of Appeals for the Second Circuit without delay, and that the said United States Circuit Court of Appeals will proceed to hear the said cause anew, and that the said decree of the said Circuit Court and every part thereof, except as aforesaid, may be reversed with costs, and that a decree sustaining the said Master's Report, overruling the exceptions thereto and awarding to the complainant the sum of $76,215.85 with interest from the 26th day of August, 1893, the date of the filing of said report, be granted in favor of said complainant against said defendants, or such other decree made as the United States Circuit Court of Appeals for the Second Circuit shall deem best.

THEODORE A. TUTTLE,
Trustee in Insolvency of
THE ELM CITY COMPANY,
By W. T. B. MILLIKEN,
Solicitor for Complainant and Appellant.

B. F. LEE,
Of Counsel.

Appeal allowed October 5th, 1894, and let citation issue returnable on the 2d day of November, 1894.

E. H. LACOMBE,
U. S. Circuit Judge.

By the Honorable E. HENRY LACOMBE, Judge in and for the Circuit Court of the United States for the Southern District of New York, within the Second Circuit.

To JOHN CLAFLIN, as Executor of the Last Will and Testament of Horace B. Claflin, deceased,
JOHN CLAFLIN,
EDWARD E. EAMES,
HORACE J. FAIRCHILD,
DEXTER N. FORCE, and
DANIEL ROBINSON.

Whereas, Theodore A. Tuttle, as Trustee in insolvency of the Elm City Company, has lately appealed to the United States Circuit Court of Appeals for the Second Circuit, from a decree entered in the Circuit Court of the United States for the Southern District of New York made in favor of you, the said defendants above named, and has given and filed good and sufficient security as provided by law to prosecute his said appeal to effect and answer all damages and costs,

Therefore, you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Second Circuit, at the City of New York, on the 2d day of November next, to show cause, if any there be, why the decree so appealed from as aforesaid should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

October 5, 1894.

E. H. LACOMBE,
U. S. Circuit Judge.

[ENDORSED:]—U. S. Circuit Court, Southern Dist. of New York.—Theodore A. Tuttle, Trustee, &c., *v.* John Claflin as Executor, &c., *et al.*—Appeal, allowance and citation.—W. T. B. Milliken, Solicitor for Complt. & Applt., Broadway & Duane St., N. Y.—B. F. Lee of Counsel, 20 Nassau Street, New York.—U. S. Circuit Court, Filed Oct. 9, 1894, John A. Shields, Clerk.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one (1) to four hundred and fifty-seven (457) inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Theodore A. Tuttle, Trustee in Insolvency of the Elm City Company, Complainant and Appellant, against John Claflin, as Executor of the last Will and Testament of Horace B. Claflin, deceased, John Claflin, Edward E. Eames, Horace J. Fairchild, Dexter N. Force and Daniel Robinson, Defendants and Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of December, in the year of our Lord one thousand eight hundred and ninety-four, and of the independence of the said United States the one hundred and nineteenth.

[SEAL.]

JOHN A. SHIELDS,
Clerk.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, as Trustee, etc.,
vs.
HORACE B. CLAFLIN, as Executor, etc., *et al.*

It is hereby stipulated that on defendants' cross appeal herein it shall not be necessary for the defendants to cause to be transmitted to the Circuit Court of Appeals a transcript of such part of the record herein as has been already transmitted on complainant's appeal herein.

Dated, New York, May 2, 1895.

B. F. LEE,
Counsel for Complainant.
EDMUND WETMORE,
Counsel for Defendants.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, Trustee, in Insolvency of THE ELM CITY COMPANY, Complainant and Appellee,
vs.
JOHN CLAFLIN, as Executor of the last Will and Testament of HORACE B. CLAFLIN, deceased; JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE and DANIEL ROBINSON, Defendants and Appellants. } In Equity.

In pursuance of, and in obedience to, Rule 11, formulated and adopted by the United States Circuit Court of Appeals for the Second Circuit, the above-named defendants and appellants, appealing from so much of the decree herein which became final on September 20th, 1894, as adjudged that the complainant recover of the defendants the sum of six cents damages, and that the complainant recover of the defendants his costs to be taxed for all proceedings prior to and including the order of reference herein made the day of March, 1884, and so much thereof as adjudges, or decrees, or recognizes the said order of reference upon which said final decree is based, or adjudges that the said letters patent upon which this suit was brought, granted to Crosby and Kellogg, dated September 2d, 1862, are valid, and that the defendants in said suit had infringed the same, respectfully make the following assignment of errors in this case, to wit:

FIRST.—That the Court erred in holding that the second claim of the patent in suit did not include the sewing mechanism described in said patent as an implied member of the combination mentioned in said claim.

SECOND.—That the Court erred in holding that either of the machines used by the defendants infringed said claim.

THIRD.—That the Court erred in holding that the defendants' machines or either of them, employed devices which are the equivalent of the crimper and smoother referred to in said claim, acting substantially as specified to fold crimps to an edge.

FOURTH.—That the Court erred in holding that the fourth claim of the patent was infringed by either of the machines used by the defendants.

FIFTH.—That the Court erred in ordering that the complainant recover damages and profits to be recovered generally, and, if any such decree could be lawfully directed, which the appellants respectfully deny, did not limit such recovery to the period subsequent to the receipt by the defendants of notice that the Griffith & Fanning machines, used by the defendants, were claimed to be infringements of the patent in suit.

SIXTH. That the Court erred in finding that the defendants had infringed the said patent in suit and did not dismiss the bill herein.

CHARLES W. GOULD,
Solicitor for defendants.

EDMUND WETMORE,
Of Counsel.

[ENDORSED :]—U. S. Circuit Court of Appeals for the Second Circuit.—Theodore A. Tuttle, Trustee, &c., Complt. and Appellee, *v.* John Claflin, as Executor, &c., *et al.*, Deft. and Appellant.—Assignment of Errors on Appeal.—Edmund Wetmore, Counsel for Defendants and Appellants, 34 Pine street, New York.—U. S. Circuit Court.—Filed Mar. 16, 1895.—John A. Shields, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

THEODORE A. TUTTLE, Trustee in Insolvency of THE ELM CITY COMPANY, Complainant and Appellee,
vs.
JOHN CLAFLIN, as Executor of the Last Will and Testament of HORACE B. CLAFLIN, deceased ; JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE and DANIEL ROBINSON, Defendants and Appellants.

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT :

The appeal of the above-named defendants and appellants respectfully showeth :

That upon the first day of August, 1878, the above-named complainant and appellee, Theodore A. Tuttle, as Trustee in insolvency of the Elm City Company, filed his bill in the Circuit Court of the United States for the Southern District of New York, against

Horace B. Claflin, John Claflin, Edward E. Eames, Horace J. Fairchild, William S. Dunn, Dexter N. Force and Daniel Robinson, defendants in a suit in equity, alleging that said defendants had infringed the rights of the complainant therein, secured to him as assignee of letters patent granted and issued on the second day of December, 1862, to Chauncey O. Crosby and Henry Kellogg, and numbered 37,033, for certain new and useful improvements in machines for producing folded trimmings, and praying for an accounting and payment to the complainant by said defendants of the profits by them realized, and of the damages suffered by said complainant by reason of said infringement of said letters patent, and also that writ of subpœna and of injunction might be issued against the said defendants.

Defendants and appellants further show, that thereafter, and on the 6th day of September, 1878, the said defendants duly appeared in said Court, and filed their appearance therein by counsel.

And defendants and appellants further show, that thereafter, and on the 7th day of October, 1878, the said defendants filed their answer to the said bill. That a general replication was filed on the 20th day of December, 1878, and issue being thus joined, and due notice being given, testimony was duly taken and filed, and such proceedings were had that on the 10th day of March, 1884, a decision was rendered by his Honor, Judge Wallace, sustaining the bill and adjudging infringement of the *second* and *fourth* claims of said patent, and on the 3d day of April, 1884, a decree was entered accordingly for an accounting and assessment of damages, and the cause was referred to Timothy Griffith, Esq., for such accounting and assessment. Thereafter, and on the 13th day of February, 1889, an order was entered on consent appointing Joseph Gutman, Jr., Esq., as Master, in the place and stead of said Timothy Griffith.

And defendants and appellants further show, that thereafter this cause was abated by reason of the death of Horace B. Claflin, one of the defendants, and that thereafter and on the 12th day of September, 1889, complainant filed his bill of revivor against John Claflin, as executor of the last will and testament of Horace B. Claflin, deceased, and the other defendants heretofore named, and by order entered October 8th, 1889, this cause was so revived in the same condition and state as it stood at the death of the said Horace B. Claflin, and thereafter and on the 12th day of November, 1889, the said defendant, John Claflin, as executor as aforesaid, appeared herein by solicitor. That thereafter and by order of November 15th, 1889, George F. Betts, Esq., was substituted as Master in place and stead of Joseph Gutman, Jr. That thereafter and by order entered on the 2d day of December, 1889, the name of William S. Dunn was stricken out as party defendant.

And these defendants and appellants further show that the accounting proceeded before the said Master, and such proceedings were had that on the 26th day of August, 1893, George F. Betts, Esq., Special Master, filed his report dated the 24th day of August, 1893, awarding $76,215.85 profits to complainant. That on the 23d day of September, 1893, the defendants herein made and filed

certain exceptions to the said report of the said Master. That the said exceptions coming on to be heard, a decision was rendered on the 15th day of March, 1894, by his Honor, Judge COXE, sustaining said exceptions, upon which, on the 10th day of April, 1894, a decree was entered sustaining the said exceptions, which decree was as follows:

"The exceptions filed on the 26th day of August, 1893, on the part of the defendants to the Master's report herein, by which report the sum of $76,215.85 was reported by the Master as the profits derived by the defendants by reason of their infringement of the letters patent upon which this suit is brought, coming on to be heard at the October session of this Court, and being argued by counsel, and it appearing to me by the testimony taken before the Master, that the combinations of the second and fourth claims of the Crosby and Kellogg patent, upon which this suit is brought, could not produce the finished product of the infringing machines used by the defendants, and that even if the said combinations could produce the finished products of the said infringing machines the comparison instituted by the Master between the cost of making the plaitings by defendant's machines, and the cost of making them by hand was not, upon the facts of this case, a proper method of computation of profits, thereupon, upon consideration thereof, it is

Ordered and decreed, that the said exceptions so far as they relate to said question, especially the *eleventh*, *twelfth*, *seventeenth*, *eighteenth* and *twentieth* exceptions be and the same are hereby sustained, and that the said report be and hereby is set aside; and it is further

Ordered and decreed, that the complainant may, if he desires, have the cause sent back to the Master for further proofs, and for a further report thereon, such election to be expressed by a notice in writing, to be filed with the Clerk of this Court within sixty days after the entry of this decree. That in default of such notice, the complainant recover of the defendants the sum of six cents damages, and that the complainant recover of the defendants his costs, to be taxed for all proceedings prior to and including the order of reference made herein on the day of March, 1884, and that the costs of the proceedings thus far had before the Masters herein be taxed in favor of the defendants."

That thereafter orders were entered from time to time, modifying said last above-mentioned decree by changing the time to file the notice of election within sixty days, to some later date; the last order in that respect being dated August 24th, 1894, which modified said decree by allowing complainant to file a notice of election, under said decree, on or before the 20th day of September, 1894.

Wherefore, these appellants appeal from so much of said above recited decree as awards six cents damages to complainant in this suit, and adjudges that the said complainant recover of the defendants herein, these appellants, his costs for all proceedings prior to and including the order of reference made herein on the day of March, 1884, and so much thereof as adjudges or decrees or recognizes the correctness of said order of reference upon which said final decree is based, so far as the said order or interlocutory

decree adjudges that the said letters patent, upon which this suit is brought, granted to Chauncey O. Crosby and Henry Kellogg, dated December 2nd, 1862, are valid, and that the defendants in said suit had infringed the same.

JOHN CLAFLIN, as Executor of the Last Will and Testament of Horace B. Claflin, deceased, John Claflin, Edward E. Eames, Horace J. Fairchild, Dexter N. Force and Daniel Robinson.

By EDMUND WETMORE, Counsel.
CHARLES W. GOULD, Solicitor.

Appeal allowed, March 16, 1895, and let Citation issue returnable on the 12th day of April, 1895.

E. HENRY LACOMBE,
U. S. Circuit Judge.

[ENDORSED:]—U. S. Circuit Court of Appeals for the Second Circuit.—Theodore A. Tuttle, Trustee, &c., Complts. and Appellees, *v.* John Claflin, as Executor, &c., *et al.*, Defts. and Applts.—Citation and allowance of Appeal.—Edmund Wetmore, Counsel for Defendants and Appellants, 34 Pine St., New York.—Receipt of copy of within Petition and Allowance is hereby admitted, dated March 8, 1895.—W. T. B. Milliken, Complts. Solr. by Lee & Lee, of Counsel. —U. S. Circuit Court, Filed Mar. 20, 1895, John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

THEODORE A. TUTTLE, as Trustee in insolvency of the ELM CITY COMPANY, Complainant-Appellee,
vs.
JOHN CLAFLIN, Executor of the Last Will and Testament of HORACE B. CLAFLIN, deceased; JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE, and DANIEL ROBINSON, Defendants-Appellants. } In Equity.

Know all men by these presents, that we, Dexter N. Force, as principal, and George E. Armstrong, as surety, are held and firmly bound unto the complainant and appellee above named as trustee, as above stated, in the full and just sum of one thousand dollars, to be paid to the said complainant as such trustee, his successors or successor, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 13th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas, the above named defendants and appellants have prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit to reverse the decree rendered in the above entitled suit in certain particulars, as will more fully appear from the appeal

and allowance filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York,

Now, therefore, the condition of the above obligation is such that if the above-named defendants and appellants shall prosecute said appeal to effect, and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

D. N. FORCE, [L. S.]
G. E. ARMSTRONG, [L. S.]

STATE OF NEW YORK, }
City and County of New York, } ss.:

On this 13th day of March, 1895, before me personally came Dexter N. Force and George E. Armstrong, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

[L. S.]

W. H. HUMPHREY,
Notary Public, Kings County,
Certificate filed in New York Co.

STATE OF NEW YORK, }
City and County of New York, } ss.:

GEORGE E. ARMSTRONG, being duly sworn, deposes and says: That he is the surety mentioned and described in the foregoing instrument. That he is a resident of and a freeholder within the State of New York, and worth the sum of one thousand dollars over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

G. E. ARMSTRONG.

Sworn to before me this 13th }
day of February, 1895. }

W. H. HUMPHREY,
[SEAL.] Notary Public,
Kings County.
Certificate filed in New York County.

[ENDORSED:]—United States Circuit Court, Southern District of New York.—Theodore A. Tuttle, as Trustee, *v.* John Claflin *et al.*—Bond on Appeal—Charles W. Gould, Solr. for Defendants, 2 Wall St., New York, Edmund Wetmore, Counsel.—Approved March 16, 1895, E. Henry Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, filed Mar. 16, 1895, John A. Shields, Clerk.

United States Circuit Court of Appeals, for the Second Circuit.

THEODORE A. TUTTLE, Trustee in Insolvency of the Elm City Company, Complainant and Appellee,
vs.
JOHN CLAFLIN, as Executor of the Last Will and Testament of HORACE B. CLAFLIN, deceased; JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE and DANIEL ROBINSON, Defendants and Appellants. } In Equity.

By the HONORABLE E. HENRY LACOMBE, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit.

To Theodore A. Tuttle, Trustee in Insolvency of the Elm City Company:

Whereas the defendants in the above-entitled suit, John Claflin, as executor of the last will and testament of Horace B. Claflin, deceased, John Claflin, Edward E. Eames, Horace J. Fairchild, Dexter N. Force and Daniel Robinson, have lately appealed to the United States Circuit Court of Appeals, for the Second Circuit, from a decree entered in the Circuit Court of the United States for the Southern District of New York, made in favor of the complainant against the said defendants, the particulars of which appeal will more fully appear from the appeal and allowance filed herein; and,

Whereas, the defendants have filed good and sufficient security, as provided by law, to prosecute their said appeal to effect and answer all damages and costs.

Therefore, you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Second Circuit, at the City of New York, on the 12th day of April, 1895, to show cause pursuant to said appeal, if any there be, why the decree so appealed from, as aforesaid, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated New York, March 16, 1895.

E. HENRY LACOMBE,
U. S. Circuit Judge.

[ENDORSED:]—U. S. Circuit Court of Appeals, for the Second Circuit.—Theodore A. Tuttle, Trustee, Complt. and Appellee, *v.* John Claflin, Executor, &c., *et al.*, Deft. and Appellant.—Citation on Appeal.—Edmund Wetmore, Counsel for Defendants and Appellants, 34 Pine St., New York.—Receipt of copy of within Citation on Appeal is hereby admitted.—Dated Mch. 18, 1895, W. T. B. Milliken, Complts. Solr.—By Lee & Lee, of Counsel.—U. S. Circuit Court.—Filed Mar. 20, 1895, John A. Shields, Clerk.

UNITED STATES OF AMERICA, } ss.:
Southern District of New York. }

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from one (1) to fifteen (15) inclusive, contain a true and com-

plete transcript of the record and proceedings had in said Court, in the case of Theodore A. Tuttle, as Trustee in Insolvency of the Elm City Company, Complainant and Appellee, against John Claflin, Executor of the last Will and Testament of Horace B. Claflin, deceased, John Claflin, Edward E. Eames, Horace J. Fairchild, Dexter N. Force and Daniel Robinson, Defendants and Appellants, as the same remain of record and on file in my office, and pursuant to the terms of a stipulation on file, a copy of which is hereto annexed.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 2nd day of May in the year of our Lord One thousand eight hundred and ninety-five, and of the independence of the said United States, the one hundred and nineteenth.

[SEAL.]

JOHN A. SHIELDS,
Clerk.

United States Circuit Court of Appeals for the Second Circuit.

THEODORE A. TUTTLE, Trustee, &c.
vs.
JOHN CLAFLIN, as Executor of Horace B. Claflin and others, formerly partners by the name of H. B. Claflin & Co.

Appeal and cross-appeal from a decree of the United States Circuit Court for the Southern District of New York.

SHIPMAN, C. J.: The plaintiff, as Trustee of the Elm City Company, which was an assignee of Letters Patent No. 37,033, dated December 2, 1862, issued to C. O. Crosby and Henry Kellogg, for a machine for crimping textile materials, brought a bill in equity July 10, 1878, against the individuals formerly composing the firm of H. B. Claflin & Co., which alleged an infringement of said patent and prayed for an injunction and an account.

A temporary injunction having been granted, the Circuit Court for the Southern District of New York, upon "final hearing" passed a decree April 3, 1884, which adjudged that the defendants had infringed the second and fourth claims of the patent and directed an accounting (19 Fed. Rep., 599). The patent had, in 1873, been sustained by Judge WOODRUFF, in the case of Elm City Co. vs. Wooster, 6 Fisher's Pat. Cases, 452.

On August 26, 1893, the Special Master filed his report which assessed no damages, and found that in the years 1873 and thereafter, until and during 1879, the defendants had in use in their business, at various times, four roller pleating machines, all which infringed the second and fourth claims of the letters patent in suit, and upon which they had pleated 483,910 yards of goods, and that the saving which had resulted from the use of said machines, over the only pre-existing method of pleating which was by hand, was $76,215.85, and reported said sum as the profits, gains and advantages which they had derived by reason of their infringement. The defendants having filed exceptions to this report, some of which were sustained,

the Court set aside the report, and in its final decree directed that the complainant recover of the defendant six cents as nominal damages, and costs for all proceedings prior to and including the order of reference, and that the costs before the Master be taxed in favor of the defendants.

From this decree each party appealed, the defendants from that portion which adjudged that there had been an infringement of claims 2 and 4 of the patent, the complainants from the whole of the decree, except that portion which recognized the validity of the patent and the infringement of claims 2 and 4, and directed the payment of costs.

The question of infringement is naturally to be first considered. The machine was for crimping or plaiting textile materials and, as shown in the drawings of the patent, was a sewing-machine attachment, but the specification and claim 1 declared that it was to be used either with or without sewing mechanism. The plait-forming mechanism was simple, but, for the purposes for which it was used, was novel. Its position in the history of the art will hereafter be considered. It consisted of a blade of metal, called a crimper, and the presser plate, which, in connection with the cloth plate or table, was a holder, and was also a presser or smoother of the plait. If the plait was wider than the presser foot, two additions on each side of the presser foot served as supplementary smoothers. A spring pressed upon the blade as it advanced to form the plait, and was relaxed when the blade was retracted. The blade, in its forward motion over the table, gathered up the material into a partially formed plait, passed with it under the presser-foot, pushed it forward between the presser-foot and the table, so that the plait was flattened, smoothed and brought to a sharp edge. The operation of the machine, including the sewing mechanism, which serves to stitch the crimp, is described in the specification as follows:

"An end of a strip of muslin is to be laid upon the platform under the crimper and under the presser-foot, and the needles will descend and have their loops secured by the loopers. While the needles are still in the cloth the crimper has retreated as far as possible from them. The crimper-presser then descends, forced down by its spring, and bears the crimper upon the goods. The latter then advances and makes a crimp of the cloth lying between it and the line where the cloth is grasped between the presser-foot and the table (see Fig. 14*a*), the crimper being actuated by the cam *j*. The latter then holds the crimper at rest, and the needles leave the cloth. The cam *k* then acts upon the crimper, and it shoves the cloth and the crimp just made under the presser-foot, the latter smoothing down or flattening the crimp by its spring-pressure upon the goods. During this second advance of the crimper it pushes the goods along under the presser-foot. The crimper now pauses, and the needles enter behind the crimp just formed (see Fig. 14B). Cam *i* now comes into action and lifts the crimper-presser, relieving the crimper from the pressure of the spring, so that the crimper may slide back without any tendency to ruck up the goods, and when *m* is elevated the cams *j* and *k* permit the spring to draw the

crimper back, ready to take a new crimp. * * * After the crimp is formed it acts as a spacer to space the crimps apart and as a pusher to force the goods through the machine. The presser-foot and the table, in conjunction, act as a holder, holding the goods at rest while the crimp is formed, and the presser-foot alone acts as a smoother, flattening the crimp down smooth and to an edge, while the goods are being crimped or pushed forward by the crimper."

The specification also said that the patentees intended at some time to add to the machine an ordinary rough surface feed, acting below the cloth, and feeding as the crimper shoved the goods, in order to aid the latter in forcing the finished crimp along when there was a heavy pressure upon the presser-foot. They also intended to attach a weight to the finished end of the crimp to aid in drawing it along when the pusher was doing its work.

The second and fourth claims are as follows:

"2. In combination, a crimper and a smoother substantially such as described, and acting, substantially as specified, to fold the crimps to an edge.

"4. In combination with a crimper substantially such as specified, a spring acting to force said crimper upon the goods while crimping them and relaxing its pressure while the crimper is retreating, substantially in the manner and for the purpose specified."

The defendants' machines, known as roller plaiting machines and as the Griffith and Fanning machines, from the names of the machinists who made them, were in their important particulars, constructed like the machine described in the English Patent to James Orr of November 4, 1867, which was never patented in this country.

These machines did not contain any sewing mechanism and consisted in general of a wide reciprocating blade and a yielding upper roll and a metallic lower roll. The blade is caused to advance to and recede from the bite of the rolls. As it advances over the surface of the lower roll, it forms a plait of the textile material lying between it and the surface of this roll, and this partially formed plait is delivered to the bite of the two rolls, which are a smoother and a holder. These rolls are revolved intermittently, and when they revolve, feed or pull the plaited fabric. The upper roll is the equivalent of the presser foot, and, in fact, a roller presser foot is old in sewing machine mechanism, the lower roll is the equivalent of the table or cloth plate of the Crosby and Kellogg machine, and the substitution of rollers for flat surfaces was an obvious mechanical transition. These machines were introduced when plaits upon wider strips of cloth than could ordinarily be presented to a sewing machine became fashionable, and when it was also important to have a machine which could readily adapt itself to cloth of different thicknesses. When sewing mechanism was not needed, the advantage of two rollers or revolving surfaces, to which the plait is presented and between which it passes, over two flat surfaces between which it is pushed, is obvious. The metallic roll is heated, so that the plait is ironed as well as smoothed.

The argument of the defendants in support of the theory of non-infringement of the second claim is based upon the part of the spec-

ification which says that after the needles leave the cloth a cam shoves the cloth and the crimp just made under the presser foot, the latter flattening the crimp by its spring pressure, and that the crimper, during this, which is its second advance, pushes the goods along under the presser foot. The defendants' construction of the second claim is that it is limited to what is called the second operation of the machine, viz.: that of folding the crimper to an edge by the combined action of the crimper in pushing the formed crimp along and the smoother pressing down upon it, as it is thus pressed forward, whereas they say that in the defendants' machine the crimper performs no part of folding to an edge, and that there is no conjoint action for this purpose between the crimper and the smoother.

The position that the second claim is limited to such a construction of crimper and smoother that both must continuously act together to fold the crimp to a perfect edge, is neither required by the specification nor by the claim. The former speaks of the crimp as formed, *i. e.*, partially formed, before it is pushed under the presser foot, and as flattened down to an edge as it is pushed through. In like manner, in the defendants' machines, the crimper is folded, though not to a complete and perfect edge, when the blade pushes it up to the surface of the lower roller, delivers it to the grasp of the two rollers which fold the crimp down over the edge of the crimper, and, as the blade recedes, complete the work of smoothing and polishing. The defendants' construction of the claim would have the effect of limiting it to a flat presser foot, between which and a flat table the crimp must be pushed; in other words, to a machine in which the crimper spaces the crimps. In the language of Judge WALLACE, upon "final hearing," "while the defendants' machines do not employ a crimper which operates independently to space the crimps their crimper and smoother effect the operation of folding the crimps to an edge, and their devices in this behalf are the substantial equivalents of those in the combination described in the second claim. In their machines the spacing is done by revolving rolls or holder which, after each crimp is formed, advances the cloth while the blade is retreating through a distance equal to the space between the successive crimps."

It is next said that the defendants' machines do not infringe claim 4. As the patent has expired, and as claim 2 is the important and valuable one of the patent, it is not necessary to consider at length this question. Claim 4 is for the combination of the blade and spring which forces the blade upon the cloth when crimping is done and relaxes its pressure when the crimper is retreating. The Fanning machine has a spring which does this precise work in the same way. The Griffith machine has no spring, but the blade is rocked by the moving mechanism down upon the cloth and as it retreats is rocked away from the cloth.

It is not necessary to discuss at length the importance of the infringed claims with relation to the entire invention of the patentees.

The Master in his report found that the invention of claim 2 was the essential feature of both the Griffith and Fanning machines with-

out which they would have been worthless. This feature was the blade which folded the material upon itself and taking the plait to the smoother to be ironed, acted in combination with the smoother and was the gist of the invention, without which plaits could not be made.

But the defendants say that even if the infringers took the essential part of the patented machine, it was itself but an improvement upon the George P. Arnold Patent of May 8, 1860, and was not essential to plaiting mechanism, and thereby attempt to bring the case within the principle of Garretson v. Clark, 111 U. S., 120. The object and scope of the Arnold machine sufficiently appear in his original specification and were to gather up one piece of cloth in small even folds or corrugations and to sew it to another piece of cloth not so gathered. The patentee said: "By my invention I am enabled to take two pieces of cloth of unequal lengths and placing their edges together with the longer piece at the bottom, and by running them through the machine, not only to gather the bottom cloth to any desired degree of fulness, but to sew them firmly together at the same time." It was strictly an attachment to a sewing machine and depended for its success upon sewing mechanism, but could be used without, and creases or gathers would be made in the cloth. It was designed to sew a ruffle upon a band and was intended to do nothing else. The patent was reissued in 1874, and, after the custom of that period, contained claims, some of which, in their broad and general language, could sweep in the Crosby and Kellogg invention, but the distinction between the two devices was correctly and forcibly stated by Mr. Brevoort as follows: "It (the Crosby and Kellogg machine) was a new mechanism, in contradistinction to being a mere improvement, but it was a mechanism which came under the broad terms of the Arnold reissue. It was by itself a different machine from the Arnold reissue." The claims of the reissued patent to John A. Pipo, a reissue on July 27, 1875, of an original patent dated January 27, 1863, are of the same character. The object of the invention was simply "to provide means (in a sewing machine) for forming and sewing a ruffle between two pieces or folds of cloth at one and the same operation." The crimping mechanism of the patent in suit was original with the inventors for the formation of the ornamentation properly called plaits, and for that purpose was a pioneer invention. The Arnold and Pipo machines merely gave hints how a plaiting machine could be made. The manufacture of plaits originated with the mechanism of Crosby & Kellogg, whose machine was not an addition to an old structure, as in Garretson vs. Clarke, *supra*, or in Reed vs. Lawrence, 29 Fed. Rep., 915.

Upon the foregoing facts the question of the rule of law in regard to the method of ascertaining the profits was not a debatable one. If the defendants had made no addition to the Crosby & Kellogg invention, it being one of an original and primary character, they took it as it was, although they furnished their machines with mechanical equivalents which might produce better work than the corresponding devices for which they were substituted, and the complainants would be entitled to the pecuniary advantage which the

infringers derived from their unauthorized use of the patent, the profit being in this case the difference between the expense of plaiting by the use of the patented device and the expense of doing the same thing by hand (Mowry vs. Whitney, 14 Wall., 620; Cawood Patent, 94 U. S., 695; Thomson vs. Wooster, 114 U. S., 104; Sessions vs. Romadka, 145 U. S., 29). The defendants insist, however, that they made additions which materially benefited the machines and increased their effective power. If this is true, although they took the whole of the vital and effective part of the invention, but superadded and annexed an improvement which contributed to the saving which they obtained, they have a right to an apportionment, the burden being upon them to show that a portion of the profits was the result of the improvement which they annexed (Elizabeth vs. Pavement Co., 97 U. S., 126; Crosby Valve Co. vs. Safety Valve Co., 141 U. S., 441).

The defendants satisfied the Circuit Court that the combinations of claims 2 and 4 would not produce the finished product of the infringing machines, and that the features added by Orr, Griffith and Fanning, and particularly the ironing feature, must have contributed something to the value of the machines and that it was erroneous to say that the whole value was due to the Crosby and Kellogg invention.

From 1871 to 1879 the trimming or ornamentation of ladies' dresses by means of plaits was universal. They were used upon materials of all kinds, as well as those of linen and cotton, which were made up into cheap suits, as those of woolen and silk. The roller machines were exclusively for the manufacture of these plaits upon strips of cloth usually of four inches, sometimes of six inches in width, which were not stitched on the machine and were nicely ironed. It is manifestly true that the patented machine, as shown in and while attached to a sewing machine, was not practically adapted to the exclusive manufacture of plaits which were not stitched. It becomes important in view of the conclusions of the Circuit Judge to ascertain to what extent and in what particulars improvements were made which brought the defendants' machines to their position of commercial importance.

The defendants first asserted that if the sewing mechanism was detached, the machine could not make merchantable plaits, unless it had additional feeding mechanism other than a four-motion feed, and that such mechanism must be produced by inventive skill. This statement would have seemed trustworthy but for the subsequent introduction into the case of the five machines and the bias pleating machine made by Mr. Walker in 1871, and efficiently used as commercial machines while the fashion for plaits lasted. They were the patented machines without the stitching mechanism and with the ordinary rough surface feed spoken of in the specification. If heat was required, it was furnished by means of gas, which was carried in a pipe under the bed or cloth plate. These machines effectually disposed of the theory that sewing mechanism was indispensable in the practical operation of the Crosby and Kellogg machines.

The next position of the defendants was that the leading improved feature of their machines was the feeding mechanism, which

consisted of the two rollers which were not the feeding device of the patented machine, and required invention to produce. But it was conceded that a roller presser foot was an early device in sewing machines, and that the upper roll acted substantially as a presser foot, with the additional function of helping to feed. When the presser foot became a roller in a plaiting machine, the table must also become a roller also, and thus rollers were naturally substituted for plates. When thus substituted they also, from the manner in which they necessarily operate, and as incidental to the work of holding and smoothing, are a feed which pulls the fabric along. This fact is insufficient to constitute them a new addition to the Crosby and Kellogg machine. That had also a feeding mechanism, and nothing has been superadded. When the infringer uses in his infringing machine the essential part of the patented machine, without which his infringing machine is worthless, it is not an adequate answer to the demand for the payment of his entire profits that his substituted equivalents improved the work of the corresponding elements of the infringed machine. The heating of the lower metallic roll, and thereby making it a device for ironing as well as smoothing, was an addition, though not a patentable one, which was not made of importance in the testimony, but it was of pecuniary importance and benefit. If the work had been done by hand it would have been necessary to press down each fold with a hot iron, as soon as made, and heat must be applied to machine-made goods in order to make them a finished article. The heated roll, so far as it was a mangle, was an annex to the existing mechanism, and if it was a superaddition which produced a pecuniary benefit in its operation, it is not of importance that it had been used before in like machines.

It follows that so much of the cost of making plaits by hand as included the cost of ironing should be deducted from the savings which the Master found were derived from the use of the infringing mechanism, and it is probable that the Master would have done so if the defendants had furnished any date from which the computation could have been made (Crosby Valve Co. vs. Safety Valve Co., *supra*). In the opinion in the Crosby case, which related to a patented valve, it appears that no evidence showed that any of the improvements which were patented after the issuance of the infringed patent, and which were owned by the defendant, gave any advantage in selling the infringing article, and therefore no allowance was made for the alleged benefit created by such improvement.

The Master proceeded to ascertain the pecuniary advantage which the infringer derived from the unauthorized use of the patent, which was in accordance with his previous findings of fact, the difference between the expense of plaiting by the use of the patented device and the expense of doing the same thing by hand. He found that the expense of plaiting about 484,000 yards, if other than woolen, would have been 15 cents per yard, and that about 60,000 yards were woolen goods which would have cost 10 cents more. We are not satisfied with the accuracy or strength of the testimony upon which this finding was made. The witnesses for the complainant made their estimate for plaiting a strip of linen four inches wide and

four plaits to the inch, which was the ordinary width called for in 1887 and 1888. Plaits varied in width from one-sixteenth of an inch to three-fourths of an inch. The narrow plaits were the most expensive. About seventy-five per cent. of the material was used in a width of four inches. The remaining twenty-five per cent. was used in widths of from half an inch to six inches. The complainant introduced three witnesses upon the subject of the cost of hand made goods. Kursheedt, a manufacturer of plaitings, estimated the cost at seventeen and one-half cents per yard, but he never plaited goods by hand for sale, and had no knowledge of what others paid. He did pay for making samples by hand in accordance with the time which the workmen took. Brown, a manufacturer of plaitings, made attempts to manufacture by hand between 1876 and 1878. His attempts resulted in a belief that the work cost him from 15 to 20 cents a yard. Wooster, who was a large manufacturer of machine made plaits, who is pecuniarily interested in the result of the suit, and who apparently has had no experience in hand plaiting, estimated that such plaitings would cost 20 cents per yard.

Smith, the defendants' superintendent of the manufacturing part of their cloak and silk department, represented them before the Master. He said nothing in regard to cost, and his only attempt to furnish testimony upon that subject was his wife's hurried experiment of about twenty minutes' duration to ascertain the time in which she could plait goods by hand upon a sewing machine.

The testimony of the complainant is unsatisfactory. Kursheedt and Wooster gave estimates only, unaccompanied with knowledge gained by experiment or by investigation. Brown made practical experiments, apparently in a small way, but all of them included the expense of ironing, which two of them seemed to regard as important, and all estimated upon plaits of a fourth of an inch in width. No account was apparently taken of the economies which would inevitably come from increased production. If the defendants had entered upon the manufacture of half a million yards by hand, the advantages resulting from a subdivision of work among experienced persons and economical methods of doing the work by wholesale, would have manifested themselves. The estimates of these witnesses are, in our opinion, the result either of inaccurate knowledge, or of an insufficient investigation of the expenses of work upon a large scale.

The Circuit Judge was of opinion that the facts in this case took it out of the general rule that the pecuniary advantages which the infringers derived from the unauthorized use of the patent, is to be estimated upon the entire production of the infringers, because, in his opinion, the evidence showed that the defendants never would have resorted to the hand method, because it was so expensive as to be prohibitory, and because it was impossible to make a marketable plaiting by hand.

There may be, and probably will be, cases in which an inadvertent infringer of an old and unknown patent for the method of manufacturing an article which is made and sold by the million at a cheap rate, and which is expensively made by hand, like paper bags, the article suggested by Judge COXE, will have a persuasive equity

against a decree for his entire profits, upon the ground that the owner of the patent suffered no damage, and that the paper-bag business was created by automatic machinery, and never would have existed if the bags must be made by hand. But the equity in this case is based entirely upon the testimony of Smith, the defendant's superintendent of manufacture, who, in answer to questions which, assuming that the cost of manufacture by hand would have been from 15 to 20 cents, asked whether it would have been practicable for the defendants to have employed such a method, replied that it would not have been, because it would have made the goods cost so much that they could not have sold them. What the effect would have been if the cost had been materially less than that which was assumed the witness did not state, and, as we are of opinion that the assumed cost was much larger than the actual cost, the answer throws no light upon the probable conduct of the defendants. The witness furthermore knew nothing upon the subject of what his employers would have done, if they had been obliged to lose money in this branch of their business, and they gave no testimony. They were doing a reputed business of from $30,000,000 to $40,000,000 per year. In 1878 the total sales of the cloak and suit department were a trifle below $600,000; the amount of sales of suits in that department was $131,287.03, and the amount of sales of plaited suits was $30,614.62. Whether the firm which undertook to do a leading wholesale dry-goods business would have permitted themselves to disregard the wants of customers by keeping aloof from an important article of trade, the witness had, apparently, no adequate means of information.

The conclusion of the Judge of the Circuit Court that a marketable article of plaitings could not be made by hand, does not seem to have been adequately supported by the testimony. It appears that the defendants generally plaited silk and dress goods and woolen goods by hand, because the machines injured the fine goods, and when, after the injunction, hand-made plaiting was used upon ordinary suits, there was no difference in the appearances of the two classes of finished work.

The defendants' fifth assignment of error upon its cross appeal was the alleged error of the Court in ordering that the complainant could recover damages and profits, and, if such a decree could be lawfully directed, in not limiting the recovery to the period subsequent to the receipt of notice to them that the Griffith & Fanning machines were claimed to be infringements. This assignment was for the purpose of taking the benefit of the decision in Dunlap vs. Scofield, 152 U. S., 244.

The bill in equity was silent upon the allegations called for by Section 4900 of the Revised Statutes that the complainants marked their machines or notified the defendants of the infringement.

After alleging the invention and grant of the patent, and the assignment, the pleader averred that the defendants, knowing the premises, infringed. This is not an averment that they had notice or knew that their machines infringed. The answer especially traversed the allegations in regard to infringement, but

was likewise silent upon the subject of notice. The defendant introduced a witness in January, 1884, who made the customary proof of good faith, and that when they were notified they stopped the use of the machines. No point was made upon final hearing, or during the nine and one-half years before the Master, in regard to the absence of the allegation or of the proof of notice, no exception upon that subject was taken to the report of the Master, the point was not made before the Court when the decree was made final, and appeared for the first time in the assignment of errors, more than sixteen years after the answer was filed.

The question is not whether the rules of pleading required the allegation of notice in a bill in equity which asked for damages and profits. That question is settled in Dunlap vs. Scofield, *supra*, but it is whether the neglect to take notice of the omission either by answer, or in any other form, until after the final decree, was not a waiver of the want of notice. It was so held in Rubber Co. vs. Goodyear, 9 Wall., 811, where the point of want of notice did not appear until the hearing before the Master, and the Court held that the triable issues must be confined to the pleadings. This was affirmed in Sessions vs. Romadka, 145 U. S., 29. In Dunlap vs. Scofield, *supra*, a bill in equity to recover damages, the bill and answer made the proper averments and denials, but no proof was given, and the Court held that the burden of proof rested upon the complainant. In Roger vs. Coupe, 155 U. S., 583, an action at law, the pleadings were silent but the question was actually litigated upon the trial by contradictory evidence and the Court thought that it should have been submitted to the jury. In this case the pleadings were silent, the question never became one actually in issue and was never raised in the Circuit Court.

It is too late to raise for the first time in an appellate court technical questions of pleading or proof which are not jurisdictional in their character, and which were not raised either in the pleadings or before the Trial Court, where defects might have been remedied, and which must, therefore, be considered to have been waived.

It is, therefore, not necessary to consider whether the provisions of Section 4900 are applicable only to cases in law or in equity, in which damages, as distinguished from profits, are the subject of investigation.

The case stands upon this wise. In our opinion the conclusions of the Circuit Judge were too sweeping in their character, and that too much importance was given to the alleged improvements which were made upon the Crosby and Kellogg machine, and to the testimony of Smith that the expense of hand-made plaits would have prohibited his employers from their use. We are, on the other hand, of opinion that an allowance should have been made for the improvement in the defendants' machine, by which the plaits were automatically ironed, and that the estimates of the witnesses upon which the Master based his findings of court, were excessive by reason of the omissions which have been mentioned. But the whole record, and the silence of the defendants, show that they must properly be charged with a large sum as profits.

We have been in doubt as to the proper disposition of the case; whether it should be sent to a Master for rehearing, or whether this Court should ascertain from the record the proper amount (Mfg. Co. vs. Cowing, 105 U. S., 253). This case has now been in court for eighteen years; it survived two Masters, and was before a Master for more than nine years. The lapse of time undoubtedly arose from a variety of circumstances, and we are not aware that it is attributable to the counsel in the case, but the delays which are incident to an accounting are well known, and we hesitate exceedingly to compel an additional expenditure of time. The manufacture of plaits in any large amount has now ceased, and it is very likely that further testimony would result only in estimates, not the result of experience. (We have therefore concluded to ascertain from the record a more satisfactory amount of profits, and conclude that a reasonable allowance will be the sum of forty thousand dollars. The decree will be reversed, with costs of this Court, and the cause remanded with instructions to enter a decree declaring the validity and the infringement by the defendants of the second and fourth claims of the Crosby and Kellogg Patent, and adjudging that the complainant recover from the defendants the sum of forty thousand dollars, as their profits, and the costs in the Circuit Court to be taxed.)

166-721

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

Ex parte

JOHN CLAFLIN, as Executor, etc., ET AL.,

Petitioners.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

EDMUND WETMORE,
CHARLES W. GOULD,
Of Counsel for Petitioners.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

Ex parte

JOHN CLAFLIN, as Executor of Horace B. Claflin, deceased; JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER FORCE and DANIEL ROBINSON,

Petitioners.

Petition for writ of *certiorari* requiring the Circuit Court of Appeals for the Second Circuit to certify to this Court for its review and determination the case of Theodore A. Tuttle, as trustee in insolvency of the Elm City Company, complainant and appellant, *versus* John Claflin, as executor of Horace B. Claflin, deceased; John Claflin, Edward E. Eames, Horace J. Fairchild, Dexter Force and Daniel Robinson, defendants and appellees.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of John Claflin, as executor of Horace B. Claflin, deceased; John Claflin, Edward E. Eames, Horace J. Fairchild, Dexter Force and Daniel Robinson, respectfully shows to this Honorable Court as follows:

FIRST. Your petitioners are citizens of the United States residing in the State of New York and are the surviving members of the late firm of H. B. Claflin & Co., of the City of New York.

SECOND. On or about the first day of August, 1878, a suit in equity was begun by Theodore A. Tuttle, as trustee in insolvency of the Elm City Company, against Horace B. Claflin and William S.

Dunn, both since deceased, constituting the then firm of H. B. Claflin & Co. for infringement of Letters Patent of the United States, No. 37,033, dated December 2d, 1862, issued to C. O. Crosby and Henry Kellogg, for an improvement in machines for frilling and crimping.

Upon the death of Horace B. Claflin the suit was continued and John Claflin, executor of Horace B. Claflin, was made a party thereto, and upon the death of William S. Dunn, the suit was continued against the surviving defendants, without joining the representatives of the said Dunn.

THIRD. The invention for which said patent was issued consisted of an attachment to a sewing machine, whereby a reciprocating blade or crimper so-called, reciprocating against the bed plate of the machine crimped or pleated a strip of cloth fed through the machine between said crimper and bed plate, so as to make a strip of narrow pleating.

The alleged infringement consisted in the use by H. B. Claflin & Co. in their department for making ladies' cloaks and garments of certain "roller-pleating machines" so-called, and known respectively, from the names of their makers, as the "Griffith" and "Fanning" machines.

These machines had no sewing mechanism. They were large machines composed substantially of two intermittently revolving rollers, one of which was heated, working in combination with a reciprocating blade, and were used in making wide pleatings, which at one time, were used as trimmings for ladies' dresses, and other garments. The machines were the invention of one Orr and patented in England, but not in the United States.

FOURTH. The answer denied novelty and infringement. Testimony was taken on both sides, and the cause was heard, at final hearing, before his Honor Judge WALLACE, who filed his decision March 10th, 1884, whereby he held that the said Orr machines contained mechanism which was an infringement of the *2d* and *4th* claims of the Crosby & Kellogg Patent, but that the other claims of said patent were not infringed.

The usual decree for an accounting was thereupon entered April 3d, 1884.

Said interlocutory decree referred the cause to Timothy Griffith, Esq., as Master, who was succeeded by Mr. Joseph Gutman, Jr.,

and, on Mr. Gutman's death, the accounting was continued before Mr. George F. Betts, upon the testimony then already taken and further evidence offered by both parties.

The Master filed his report, dated August 24th, 1893, whereby he found no damages, but that the defendants had made savings by the use of the patented invention amounting to $76,215.85.

FIFTH. Exceptions were duly filed to this report on behalf of the defendants, which were heard by his Honor Judge COXE, who sustained said exceptions, so far as they related to said finding as to savings, and held that there was no proof of any profits by way of savings and set aside said report, and gave the complainant his option either to go back to the Master for a new hearing, or to appeal directly from the decree setting the report aside.

The complainant elected to appeal, and, at the same time, the defendants appealed from so much of the final decree of the Circuit Court as was based upon Judge WALLACE's original decision finding infringement of the *first* and *fourth* claims of the patent.

Both appeals were heard together and the said Circuit Court of Appeals affirmed the decision of his Honor Judge WALLACE as to infringement, and reversed the decision of his Honor Judge COXE, so far as the same held that there was no sufficient proof before the Master to enable him to compute profits by way of savings and assessed said profits at forty thousand dollars ($40,000) and directed a decree to be entered for that amount.

SIXTH. The material evidence before the Master relating to alleged profits by savings was, in substance, as follows:

First.

The *second* and *fourth* claims of the Crosby & Kellogg Patent are as follows:

"2. In combination, a crimper and smoother substantially such "as described, and acting substantially as specified to fold the "crimps to an edge."

"4. In combination with a crimper, substantially such as "specified, a spring acting to force said crimper upon the goods "while crimping them, and relaxing its pressure while the crimper

" is retreating, substantially in the manner and for the purpose " specified."

The " smoother " referred to in the *second* claim, above quoted, is the ordinary presser foot of a sewing machine, and it acts together with the crimper or blade to fold the goods to an edge by holding the cloth fast at a place in advance of the crimper, as the latter brings it up to said presser foot; and the spring of the *fourth* claim is a piece held down on the top of the crimper or folding blade so as to press said crimper or blade on the goods as it advances, and which rocks off said blade at the end of the stroke, leaving the same to be drawn back for a fresh start without bearing down upon the goods, thus avoiding the danger of rucking them up in its retreat.

The roller pleating machines used by defendants, besides the combinations of mechanism referred to in the *second* and *fourth* claims of the Crosby & Kellogg Patent in suit, held by his Honor Judge WALLACE to be contained in said machine, also contained:

1st. The patented invention of George B. Arnold covered by the Arnold Reissue Patent No. 6159. This reissue was sustained by the United States Circuit Court for the Second Circuit and Southern District of New York, and roller pleating machines like the defendants were held to be covered by said reissue and were enjoined thereunder, and said decision has never been reversed. A suit was begun against these defendants under said Arnold reissue December, 1878, after defendants' machines had already been enjoined in the present suit but said Arnold suit was never prosecuted to judgment.

2d. The said machines also contained the invention of John A. Pipo, covered by the reissued letters patent issued to George H. Wooster, as assignee of said John A. Pipo, No. 5565, dated July 27th, 1875, and the identical machines here in suit were enjoined by the United States Circuit Court for the Southern District of New York, February 28th, 1879, in a suit brought for the infringement of said letters patent against these defendants, and remained in full force and unreversed until the expiration of said reissued letters patent. It was impossible to use said roller-pleating machines without infringing both the said Arnold and Pipo reissues.

3d. The said machines also included the invention relating to the whole machine patented to James Orr in England, November 4th, 1867, No. 3093, but not patented in this country.

4th. The said machines also contained various unpatented de-

vices and improvements introduced by their makers, Griffith and Fanning, respectively.

No machine like the roller-plaiting machine was known or used in the art until Orr's invention thereof and its introduction by him through the firm of Kurschedts in this country more than six years after the Crosby and Kellogg Patent.

It was found both by the Circuit Court and the Circuit Court of Appeals that a material part of the profits arising from savings was due to the features of the machine above enumerated, or some of them, and not included in the Crosby and Kellogg Patent.

His Honor Judge COXE states in his opinion that the testimony "establishes" the proposition that "the combinations of the *second* "and *fourth* claims of the Crosby & Kellogg Patent would not pro- "duce the finished product of the infringing machines used by the "defendants," and proceeds as follows:

"The invention is an ingenious device, designed originally for a "sewing machine attachment, and intended to do the same general "character of work as the Arnold ruffler, but it was distinctly an "advance over the Arnold machine. It is entirely clear, however, "that the mechanisms covered by the *second* and *fourth* claims did "not and could not produce a commercial plaiting like those made "on the defendants' machines, viz., a spaced and ironed wide plait- "ing ready for use as a trimming for ladies' gowns. The defend- "ants' machines took the frills produced by the combinations of "the claims, and, by making the plaits uniform and ironing them "down, originated something which caught the market and produced "the demand.

"In 1867, James Orr, of Glasgow, invented a roller-plaiting "machine which seems to have created the demand for trimmings "of this kind.

"At least there is no satisfactory proof that for six years, and "more, after the Crosby & Kellogg invention, their machine, as "patented, ever did or ever could make a yard of trimming like that "made by the defendants' machine. It was to these machines "organized and perfected long after the Crosby & Kellogg inven- "tion, and containing as they did the condensed ingenuity of several "prior structures that the art was indebted for the trimming so "fashionable during the period in question. Surely the features "added to the machine by Orr, Griffith and Fanning, and partic-

" ularly the ironing feature by which a perfect symmetrical finish is " imparted to the plaitings, must have contributed something to " their value. To assert that the whole value is due to the Crosby & " Kellogg invention is erroneous."

The Circuit Court of Appeals did not deny that the invention of the Arnold reissue was found in the Griffith and Fanning machine, or that the claim of the Pipo reissue were found therein, and there was no finding or evidence that the inventions described and claimed in said reissues, whether the reissues were valid or invalid, were the inventions of Crosby & Kellogg. Nor did the said Circuit Court of Appeals deny that said features patented to Arnold and Pipo and the unpatented features of the machine, not found in the Crosby & Kellog Patent, contributed materially to the profits.

The learned Court held, in substance, that, as a part of said improvements, they were equivalents which did better work than the parts for which they were substituted but that the heated rollers performing the work of ironing constituted an addition to the machine " of pecuniary importance and benefit."

The operation of pleating performed on the defendants' machines consists of several successive operations, namely :

1. Folding the cloth to an edge so as to make a pleat.
2. Feeding the said pleats, thus formed, through the rollers and thereby " spacing " the pleats, *i. e.*, determining the distance between the folds making the successive pleats, which distance is greater or less according as the material is fed forward a greater or less distance after each fold.
3. Ironing down the pleats so as to make them flat and smooth and give the required appearance to the finished fabric.

The *first* of the said enumerated processes alone employ combinations of mechanism contained in the *second* and *fourth* claims of said Crosby & Kellogg Patent, alleged to be infringed.

In the Crosby & Kellogg Patent the " spacing " is done by the crimper or folding blade, which first folds the material to an edge and then, it having been sewed down by the sewing mechanism, the said blade, by a second forward movement, pushes it through the machine, thus feeding it out and making the space between the pleats. His Honor Judge WALLACE held that, as in the defendants' machines the blade did *not* do the spacing, the *first* claim of the

patent, which included that feature, was not infringed, thus holding that the defendants' machine did *not* contain the mechanism of the Crosby & Kellogg Patent for performing said operation of spacing, nor *any equivalent* therefor. The ironing feature was *wholly absent* from the Crosby & Kellogg Patent.

The saving in the use of defendants' machines was due, to a large extent, to the saving in the process of ironing the pleats by the machine, as part of the operation of pleating over the cost of doing the said work of ironing by hand.

No evidence whatever was given by the complainant or appeared in the case tending to separate or apportion the profits or savings made by the use of the defendants' machines, between the features covered by the *second* and *fourth* claims of Crosby & Kellogg Patent and the unpatented features or the features covered by other patents.

The Circuit Court of Appeals held that the burden lay on the defendants to make such apportionment.

In its opinion, referring to said ironing feature, the learned Court says :

"It follows that so much of the cost of making plaits by hand "as included the cost of ironing should be deducted from the sav- "ings which the Master found were derived from the use of the in- "fringing mechanism, and it is probable that the Master would have "done so if the *defendants* had furnished any data from which the "computation could have been made."

Second.

The profits by savings were attempted to be estimated by taking the supposed difference in cost between the work on the defendants' machines and doing the same work by hand.

By doing the work by hand was meant folding the cloth to an edge by any means by hand and then ironing out said pleat by the use of a flat-iron or other appropriate means.

The Circuit Court of Appeals finds that, "if the work had been "done by hand, it would have been necessary to press down each "fold with a hot iron as soon as made ; and heat must be applied "to machine-made goods in order to make them a finished article."

The said ironed pleats, such as the defendants' machines produced had never been made by hand for commercial purposes. The defendants had had certain pleating done by hand, at their establish-

ment, without ironing, the operator manipulating the material and folding it into pleats by the fingers, as it passed through an ordinary sewing machine. This pleating was used on silk and dress goods; some woolens were also pleated in this manner.

The greater part of the pleating done on the machines was of linen or percales, seven-eighths, by estimate, being of those materials, the remaining eighth being woolen or worsted goods.

The testimony introduced by the complainant on the subject of hand-made pleating was to the effect:

1st. That such pleating, upon a rough estimate, would cost from fifteen to twenty-five cents a yard to make, the estimates differing, and none of the witnesses having ever had any experience with hand-made pleating, or made or sold any such pleatings with the exception of one, who said he once attempted to make some and found that it would cost too much to enable him to sell the goods, and abandoned it.

2nd. That said method of making pleats by hand was so inadequate to produce a result equally beneficial with that produced by the machine, that hand-made pleatings could not be made to compete with machine-made pleatings or be used, commercially, as a substitute therefor.

The material parts of said testimony are, as follows (italics ours):

Frederick A. Kursheedt, for complainant. He testified that to pleat "a strip of linen or percales" (the goods principally pleated by defendants) "four inches wide into plaits a quarter of an "inch wide by hand" (an ordinary width on the machines), "would cost "seventeen and a half cents a yard."

He further testified as follows (omitting objections):

"28 Q. Can hand-made plaitings, by ever so careful and laborious "manipulation, be made *as merchantable* as machine plaitings made "by the Crosby & Kellogg device before referred to?

"A. You *cannot* make plaitings, for the purposes of trade, by "hand to be equally valuable as those made by machine.

"CROSS-EXAMINED:

"32 x-Q. When did you pay 17½ cents a yard for plaiting a strip "of linen or percale four inches wide into plaits one-quarter of an "inch wide by hand?

" A. I have not paid that price for plaiting any quantity of " those goods by hand, but have fixed the price as being what it " would cost to do the work.

" 33 x-Q. What person, firm or corporation, to your knowledge, " has paid during the period referred to in your direct examination " 17½ cents a yard for plaiting a strip of linen or percale four inches " wide into plaits one-quarter of an inch wide by hand?

" A. I have no knowledge as to what other firms or parties have " paid for plaiting goods by hand, as described during the period " referred to.

" 34 x-Q. You say you have not paid the price named for plait- " ing any quantity of the goods by hand. Have you ever paid that " price in any instance, to wit, seventeen and a half cents a yard, for " plaiting a strip of linen or percale four inches wide into plaits one- " quarter of an inch wide by hand?

" I have *not plaited* goods four inches wide as described by " hand, and have not paid that price, and what plaiting I have made " of that character by hand have *only been as samples.*"

Record, pp. 68, 69.

Henry S. Brown, for complainant, testifying to the same point and in reference to the period covered by the accounting (omitting objections and italicizing), said:

" 7 Q. Do you know what the cost of manufacturing linen plait- " ing, four pleats to the inch and four inches wide, was—linen or " percale goods?

" A. Well, at that time it was almost impossible to get girls to " pleat those narrow pleats in any kind of a perfect manner to be " saleable, and they cost me from fifteen to twenty cents a yard.

" 8 Q. Could it be done for any less than that by hand?

" A. I didn't think that it could at that time. I put my forelady " on it, and she was pretty experienced in all kinds of sewing ma- " chine work, and she did the best she could.

" 9 Q. How much more would it cost to pleat the same in " woolen?

" A. Not less than ten cents a yard.

" 10 Q. Then it would be from twenty-five to thirty cents a yard?

" A. Yes, it would. Every pleat, after being laid, would have to " be pressed out with a hot iron to make it stay flat. * * *

" 27 x-Q. Did you sell any linen pleatings, or pleatings of per-
" cale, four pleats to the inch and four inches wide?

" A. Not of percale; very little linen; mostly organdie and lawn,
" as they were easier to pleat, and cheaper and more desirable in my
" trade.

" 28 x-Q. How much did you get a yard for the linen pleatings
" referred to in the last question?

" A. I couldn't tell.

" 29 x-Q. Can you state whether you got more than 15 or 20
" cents?

" A. *I could not have sold it for 20 cents. It came too expensive to
" make up in that way. I had to get a machine to pleat up those goods
" afterwards.*

" 30 x-Q. And is the same true of the price 15 cents for those
" goods? Did you sell any at as high as a price as that?

" A. I couldn't tell what I got for the goods. *They came too ex-
" pensive. I had to plait them by machinery.*

" 31 x-Q. Then, when you say that those goods cost you from
" 15 to 20 cents, do you mean that you experimented to find out how
" much it would cost at that time to plait them by hand, and you
" ascertained that it would *cost so much that it was impossible to em-
" ploy that method of plaiting* where such linen or percale goods
" were to be used by manufacturers?

" A. After experimenting and having my girls try to plait them
" up, I found it *would cost me too much*, and I would have to use a
" machine for doing the work.

" 32 x-Q. Did you ever plait any woolens by hand, which, you
" say, would cost from 25 to 30 cents a yard?

" A. I tried it and found it would *cost too much* and *I couldn't do
" it*—plaitings for bottoms of dresses.

" 33 x-Q. You never sold, or attempted to sell, any woolen plait-
" ings which had been plaited by hand, did you?

" A. I don't think I did. * * * *See page 72-75*

GEORGE H. WOOSTER, for the complainant, testified:

" 11 Q. What would be the cost of manufacturing percale and
" linen plaitings four inches wide and four plaits to the inch by
" hand?

" A. To manufacture such materials by hand with the degree of
" nicety required by the market would be very expensive. They
" could not be manfactured *at any cost* to *compete in quality* with

" the same kind of plaitings made by machine. Each plait would " have to be *measured* and *laid into a fold;* that fold would have to " be *pressed down with a hot iron* as soon as made. All these goods " during these years were hemmed on each edge with a double hem " which was difficult to *plait and press by hand;* but, in order to " make a plaiting which would approach in any degree the machine- " made plaiting in perfection, the width of material and width of " plait required of would cost at least 20 cents a yard in linen and " percales, in my opinion."

Record, pp. 99

ALEXANDER E. KURSHEEDT, for complainant, testified as follows, (referring to the roller or Orr machine like the defendants) :

" A. Well, as a matter of fact, machine-made plaitings in these " widths were made anterior to hand-made plaitings. The article is " *created by the machine*—that is, with the invention of the machine. " Before that time the trimmings of near a similarity were gathered, " shirred or ruffled. I don't believe that *any attempt* to make a " *hand plaiting* of this width was *ever made* previous to the invention " of the *roller plaiter.*

" 36 x-Q. Is it your opinion that the roller plaiter does better " work for side plaiting for material like that of the specimen and " width like that of the specimen than plaiting done by hand?

" A. A *roller plaiter* properly adjusted makes perfect plaiting; I " mean by that that every plait is perfect in respect to the exact " quantity of material taken up, and the *space* between the plaits is " likewise perfect, being always the same. Moreover, smaller plaits " can be made by a machine than can be made by hand, so that it is " *impossible* to make more than a *rough imitation* of side plaiting by " hand." * * *

" 39 x-Q. Then, is it your opinion that, for the purposes of prac- " tical manufacture, it is not possible to obtain as good a result of " side plaiting by hand as can be obtained by the use of the machine " like the exhibit?

" A. Yes; I consider that self-evident."

Record, pp. 150

The defendants had no data for estimating the cost of the hand-pleating above mentioned, done at their establishment on silk and some woolen goods without ironing, because, in their accounts, the

labor for pleating was included in the whole cost of the garment to which it was attached, without specification for the work of pleating.

Rec., p. 101, 70, 80

Mrs. Smith, who had supervision of the entire work-rooms where the garments were made at the defendants', Claflin & Company, during the whole period covered by the accounting, and who before that held a similar position at Hayes & Adler's, and was familiar with all the pleating done by the defendants, and was herself a skilled operator and the designer of part of the dresses trimmed with the pleatings, calculated, after timing herself by making pleatings of various widths on the sewing machine, that, at the wages paid competent operators for that sort of work, the hand-pleatings made on the sewing machine would take five minutes to the yard of labor which could have been obtained at the rate of five dollars per week for that work, although such work was done at Claflin's by workmen earning eight dollars per week, making the cost about three-quarters of a cent a yard, or at eight dollars a week a little over a cent a yard.

The cost of pleating on the roller-pleating machines was estimated by the defendants in making their estimates on proposed garments at one-half cent a yard.

The defendants superintendent of the cloak and suit department, A. K. Smith, testified that it would have been impracticable for the defendant to have employed any method of pleating costing from 15 to 20 cents a yard, because it would have made the goods cost so much the defendants could not have sold them.

SEVENTH. The foregoing was the only evidence in the case tending to show any profits of any sort received or made by the defendants by the use of said infringing machines.

EIGHTH. The owner of said Crosby & Kellogg Patent had no fixed license fee, but licensed manufacturers using roller-pleating machines, for the period covered by the accounting, both for past and future use. Mr. Kurshedt who had charge of the licensing from 1877 and onwards stated that the largest amount charged for a license for past and future use was one thousand dollars.

His testimony on this point was as follows (omitting objections):

" 7 Q. Can you state what was the highest price charged and " received, and what the range of prices from high to low, for the

" right to use the Crosby & Kellogg Patent during the period you " mentioned to firms in this city, of the standing of H. B. Claflin & " Co., and doing a similar class of business?

" A. There was no fixed license fee, and I recommended the " settlements which were accepted for the term, from the date of " the settlement to the expiration of the patent, which was, in no " instance, to my recollection, over eighteen months. The largest " amount was one thousand dollars. I have no distinct recollection " of taking less than that amount while the patent was in existence.

" 8 Q. Were all the licenses that were issued under this patent, " during the period you mentioned, printed forms in which the " blanks were filled up?

" A. No; none of them were.

" Q. Did any of those documents relate to past damages as well " as to future license fees?

" My best impression is that they all did.

" 10 Q. Was any other consideration than a sum of money paid " when those documents were delivered?

" A. I have no recollection of any other at present. It was " some time ago." *Rec. fo 97*

Claflin & Co. had in their possession, as found by the Master, at various times four roller pleating machines of the Griffith or Fanning pattern, both being substantially alike.

The following are the instances of the amounts charged those using a similar number of machines :

	Entire license fee payable in installments.
Bergenstein, 4 machines	$800
Kish, 4 machines	1,000
Lidenberg, 6 to 8 machines	1,000

Rec. fo. fo. 200, 202, fo. 111, 212

NINTH. The Master estimated that the entire profits of the use of the roller pleating machine were due to the presence therein of the *second* and *fourth* claims of the Crosby & Kellogg Patent, and calculated said profits by taking one-half a cent a yard as the cost of pleating on the machines, and estimating the cost of hand pleating at fifteen cents a yard for all goods except woolen, and twenty-five cents a yard for woolen goods, making up a total of $76,215.85.

TENTH. His Honor Judge COXE set this report aside as not supported by the proofs, and founded on conjecture, and because on the

proofs it appeared that the hand-made method which the Master adopted as the standard of comparison was so expensive as to be prohibitory, and was inadequate to produce, by that method, ~~ma-~~ pleatings ~~chines~~ that could compete successfully with machine-made pleatings.

ELEVENTH. The learned Court of appeals held:

1st. That the estimates of the cost of hand pleating including the ironing by the complainant's witnesses were unsatisfactory, and, in the opinion of the Court, "the result of either inaccurate knowl-"edge or of an insufficient investigation of the expenses of work on "a large scale."

2d. That the same conclusion applied to the testimony of Mrs. Smith as to her estimate of hand pleating (which related to pleating on the sewing machine without ironing).

3d. That the assumed cost of hand pleating (*i. e.*, the estimates of complainant's witnesses) was much larger than the actual cost.

4th. That the testimony of the defendants' superintendent that it would not have been practicable for the defendants to have employed a method of hand pleating which would have cost fifteen to twenty cents a yard (the estimates of complainant's witnesses) because it would have made the goods cost so much they could not have sold them, throws no light on the probable conduct of the defendants if the goods had cost less.

5th. That the defendants' superintendent knew nothing upon the subject of what his employers would have done if they had been obliged to lose money in this branch of their business, and they (the employers) did not testify what they would have done in such case.

6th. That the conclusion of the Judge of the Circuit Court that a marketable article of pleatings could not have been made by hand, does not seem to be supported by the testimony.

7th. That an allowance should be made for the improvement in the defendants' machine by which the pleats were automatically ironed.

8th. That "the whole record and the silence of the defendants "show that they must be properly charged with a large sum as "profits."

9th. That, in view of the lapse of time and that "any further "testimony would result only in estimates not the result of experi-"ence," the Court has "concluded to ascertain from the record a

" more satisfactory amount of profits," and " conclude that a reason-
" able allowance will be forty thousand dollars."

The text of that part of the opinion of the learned Court of Appeals covering the foregoing points is as follows:

" The Master proceeded to ascertain the pecuniary advantage
" which the infringer derived from the unauthorized use of the pat-
" ent, which was, in accordance with his previous finding of fact, the
" difference between the expense of plaiting by the use of the pat-
" ented device and the expense of doing the same thing by
" hand. He found the expense of plaiting about 484,000
" yards, if other than woolen, would have been 15 cents per
" yard, and that about 60,000 yards were woolen goods,
" which would have cost 10 cents more. We are not satisfied with
" the accuracy or strength of the testimony upon which this finding
" was made. The witnesses for the complainant made this estimate
" for plaiting a strip of linen four inches wide and four plaits to the
" inch, which was the ordinary width called for in 1887 and
" 1888" (*sic* error for 1877 and 1878). " Plaits varied in width
" from one-sixth of an inch to three-fourths of an inch. The
" narrow plaits were the most expensive. About 75 per cent.
" of the material was used in a width of four inches. The
" remaining 25 per cent. was used in widths of from half an
" inch to six inches. The complainant introduced three witnesses
" upon the subject of the cost of hand-made goods. Kursheedt, a
" manufacturer of plaits, estimated the cost at 17½ cents per yard;
" but he never plaited goods by hand for sale, and had no knowl-
" edge of what others paid. He did pay for making samples by hand
" in accordance with the time which the workman took. Brown, a
" manufacturer of plaits, made attempts to manufacture by hand
" between 1876 and 1878. His attempts resulted in a belief that the
" work cost him from 15 to 20 cents a yard. Wooster, who was a
" large manufacturer of machine-made plaits, who is pecuniarily in-
" terested in the result of the suit, and who apparently has had no
" experience in hand-plaiting, estimated that such plaits would cost
" 20 cents per yard. Smith, the defendants' superintendent of the
" manufacturing part of their cloak and suit department, repre-
" sented them before the master. He said nothing in regard
" to cost, and his only attempt to furnish testimony upon
" that subject was his wife's hurried experiment of about twenty
" minutes' duration, to ascertain the time in which she could plait
" goods by hand upon a sewing machine. The testimony of the

" complainants is unsatisfactory. Kursheedt and Wooster gave " estimates only, unaccompanied with knowledge gained by experi- " ment or by investigation. Brown made practical experiments, " apparently in a small way, but all of them included the expense of " ironing, which two of them seemed to regard as important, and all " estimated upon plaits of a fourth of an inch in width. No " account was apparently taken of the economies which would in- " evitably come from increased production. If the defendants had " entered upon the manufacture of half a million yards by hand, the " advantages resulting from a subdivision of work among experi- " enced persons, and economical methods of doing the work by " wholesale, would have manifested themselves. The estimates of " these witnesses are, in our opinion, the result either of inaccurate " knowledge or of an insufficient investigation of the expenses of " work upon a large scale.

" The Judge of the Circuit Court was of opinion that the facts in " this case took it out of the general rule that the pecuniary advan- " tage which the infringers derived from the unauthorized use of " the patent is to be estimated upon the entire production of the " infringers, because, in his opinion, the evidence showed " that the defendants never would have resorted to the hand " method, because it was so expensive as to be prohibitory, " and because it was impossible to make marketable plaits by hand. " There may be, and probably will be, cases in which an inadvertent " infringer of an old and unknown patent for the method of manu- " facturing an article which is made and sold by the million at a " cheap rate, and which is expensively made by hand, like the " article of paper bags, suggested by Judge COXE, will have a per- " suasive equity against a decree for his entire profits, upon the " ground that the owner of the patent suffered no damage, and that " the paper-bag business was created by automatic machinery, and " never would have existed if the bags must be made by hand. But " the equity in this case is based entirely upon the testimony of " Smith, the defendants' superintendent of manufacture, who, in an- " swer to questions which, assuming that the cost of manufacture by " hand would have been from 15 to 20 cents, asked whether it would " have been practicable for the defendants to have employed such a " method, replied that it would not have been, because it would have " made the goods cost so much that they could not have sold them. " What the effect would have been if the cost had been materially " less than that which was assumed, the witness did not state; and,

" as we are of opinion that the assumed cost was much larger than " the actual cost, the answer throws no light upon the probable con- " duct of the defendants. The witness, furthermore, knew " nothing upon the subject of what his employers would " have done if they had been obliged to lose money " in this branch of their business, and they gave no " testimony. They were doing a reputed business of from $30,000,- " 000 to $40,000,000 per year. In 1878 the total sales of the cloak " and suit department were a trifle below $600,000. The amount of " sales of suits in that department was $131,287.03, and the amount " of sales of plaited suits was $30,614.62. Whether the firm which " undertook to do a leading wholesale dry-goods business would " have permitted themselves to disregard the wants of customers by " keeping aloof from an important article of trade, the witnesses " had, apparently, no adequate means of information. The conclu- " sion of the Judge of the Circuit Court, that a marketable article of " plaitings could not be made by hand, does not seem to have been " adequately supported by the testimony. It appears that the " defendants generally plaited silk and dress goods and woolen " goods by hand, because the machines injured the fine goods; and " when, after the injunction, hand-made plaiting was used upon " ordinary suits, there was no diffierence in the appearance of the " two classes of finished work." This last was a misapprehension.

There was no evidence in the case that the defendant used any hand plaiting after the injunction. They had, after the injunction, some plaiting done at plaiting establishments at *½ a cent a yard*, which Smith said he could not distinguish, but which from the cost was, of course, done by machine, and after the machines were enjoined the suits were designed without pleating, other trimming being used without affecting the bulk of defendant's business.

Rec., p. 51, Q. 1; p. 90.

TWELFTH. The complaint contained no notice of marking " patented," but alleged that the defendants committed the infringement " well knowing " the issuing of the patent and the complainant's title.

The answer put in issue the allegations of the bill by a general denial. No exceptions were filed to the answer, but only a replication.

As part of the evidence for the defendants at final hearing, the deposition of William Ferguson was taken, who testified that the defendants purchased the machines in ignorance of the complainant's

patent, and used the same without any knowledge or notice of said patent or any claim against them, until notice was served by complainant's solicitor preliminary to this suit, and that if any such notice had been given, he would have known it. This evidence was uncontradicted. The bill was filed August 1st, 1878, a preliminary injunction was issued November 18th, 1878, the patent expired December 2d, 1879.

No exception was filed before the Master, or request made that he limit the recovery to the period subsequent to notice.

An assignment of error was made on the appeal from the decision at final hearing on the ground that it affirmatively appeared that defendants had received no notice and there was no allegation or proof that the complainant had marked the patented article "patented," in accordance with the Statute.

The Court of Appeals held that the objection had been waived.

THIRTEENTH. That your petitioners respectfully submit the following assignment of some of the errors in the decision of the Circuit Court of Appeals.

First. The said Court erred in finding that with the exception of the heated roll, operating as a mangle, there was nothing in the defendants' machines contributing to the saving caused by their use except the presence therein of the combinations in the *second* and *fourth* claims of the Crosby & Kellogg Patent, and that the defendants took the invention of said claims "as it was, although they "furnished their machines with mechanical equivalents which might "produce better work than the corresponding devices for which they "were substituted;" and that the complainant was entitled to recover the whole of said profits made by savings except only that "so much of the cost of making pleats by hand as included the cost "of ironing should be deducted from the savings" derived from the use of the infringing mechanism.

I.

The Crosby & Kellogg mechanism was only an improvement upon the preceding Arnold Patent granted May 8th, 1860, and extended and reissued December 1st, 1874. The Arnold mechanism is the fundamental and primary device which lies at the bottom of all automatic pleating machines, all subsequent machines for this purpose being embraced in Arnold's original invention. The concep-

tion which lies at the bottom of that invention is that of forming a fold of cloth back upon itself, whether such a fold be called a pleat, crimp, gather or other name, by the device of holding the cloth stationary in front of a gatherer or crimper, which takes hold of the cloth and brings it up to where it is held stationary, thus folding the cloth upon itself. The feeding mechanism then begins to act and taking hold of the fold thus made (and stitched when the sewing mechanism is used), carries it out of the machine. The amount of cloth contained in the fold is regulated by the distance of the gatherer or crimper from the place where the cloth is held fast when it begins its forward movement, and the amount of space between the crimps depends upon the amount of cloth fed out before the folding mechanism again comes into operation.

Arnold was the very first to devise any form of this mechanism, and, like the Crosby & Kellogg, his invention was embodied in an attachment to a sewing machine. In the Crosby & Kellogg mechanism, the pleat is formed by the device of holding the cloth stationary in front of the crimper, the cloth being held between the presser foot and bed plate of the machine, and in the language of the specification, "the presser foot and the table in conjunction act as a holder "holding the goods at rest while the crimp is formed."

The improvement introduced by said Crosby & Kellogg's mechanism consisted in putting the crimper above the bed plate instead of operating from below, and, in the said Crosby & Kellogg Patent, the feeding and spacing are done by the crimper acting against the bed plate with or without an additional feed, whereas in the Arnold, the feeding and spacing are done by the mechanism that also acts as a holder. In both the Arnold and the Crosby & Kellogg structures the amount of cloth to be taken in the fold is determined by mechanism regulating the extent to which the crimper retreats to take up the material for a fresh fold.

The defendants' roller-pleating machines used the device of the Arnold Patent, to wit, the pleat is formed by the two rollers which act both as the holding and the feeding mechanism, holding the cloth in front of the folding blade, which brings up a fold of the cloth and delivers it to the rollers, the said rollers during this operation remaining stationary and acting as holders, and then, by the revolution of the rollers, the said cloth is fed out of the machine and the spacing between the folds is performed. It was held by the United States Circuit Court that these machines infringed the Arnold reissue. The claims of the said reissue differ from the orig-

inal chiefly in that the original claims included the sewing mechanism which was omitted from some of the claims of the reissue. The said reissue has never been held to be invalid. It is wholly immaterial for the present purpose whether it is invalid by reason of an unlawful broadening of the claim of the original or not. The Circuit Court, by sustaining the reissue and enjoining the machines, held that the original specification and drawing would have justified the claims made in the reissue. It may be that, as the law is now understood, it would be held that these claims, not having been made in the original, covered matter that had been dedicated to the public. But, whether they belong to the public, or were covered by the reissue, in neither case do they belong to Crosby & Kellogg, and, so far as the operation of the roller-pleating machines involved this invention, as a fundamental principle, it cannot be said that the entire profits of the machine were due to the Crosby & Kellogg improvement, and it is admitted that it would be impossible to use the machines without the use of the said Arnold invention.

Says Mr. Brevoort, the complainants' expert, speaking in reference to said defendants' machines:

"17 x-Q. Under the construction given to the Arnold reissue by "Judge BLATCHFORD, as referred to, it would be practically impos- "sible, would it not, to make the said plaiting machines without in- "fringing the said Arnold reissue?

"A. Under the construction given to the Arnold reissue by the "Court, the defendants' machines, such as the Fanning and the Grif- "fith machines, were made tributary to the Arnold reissue, this re- "issue having been given such a broad interpretation that all exist- "ing forms of mechanical plaits came under its broadened "claims. * * *

"20 x-Q. Under the said broad construction is it possible to "make the paarticular devices covered by the claims of the Crosby "& Kellogg Patent, held to be infringed in this suit, without in- "fringing said Arnold reissue?

"A. No; such devices would have come under the broad terms "of the Arnold reissue." *Rec. pp. 86, 87*

It is also proved that in a suit brought by Wooster, who is prosecuting this suit, under the Pipo reissue, against these defendants, it was held that the identical machines here in suit contained the inventions covered by the Pipo reissue relating to the flexible pleat-

ing blade necessary to perform the work on the variety of materials used in the machines, and embracing mechanism for causing the blade to press on the goods in its forward movement and relieve it from pressure during its retreat, and an injunction was issued against the defendants, after an argument on the merits, prohibiting the use of said machines for that reason.

Rec., pp. 112, 208

It is also admitted that the said roller machines, as an entirety, were invented by Orr in England and were there patented, and the work of making pleatings, for which purpose the defendants used the machines, was never done on any machines, and there existed no machine capable of doing the same until the said Orr invention some seven years after the Crosby & Kellogg Patent.

Under these circumstances, the finding of the Court that the effective and valuable features of defendants' roller-pleating machines were all, with the exception of the ironing feature, derived from the Crosby & Kellogg Patent, or from mere equivalents for the combinations taken from said patent, is manifestly erroneous:

1st. The combination of the Arnold Patent contributed to the beneficial results and embraces a fundamental principle of the machine. That is not the use of any equivalent to the Crosby & Kellogg Patent, because Arnold's was a prior invention to that of Crosby & Kellogg, and Crosby & Kellogg's invention has been judicially determined to be subordinate to the Arnold invention.

2d. The features taken from the Pipo Patent, relating particularly to the operations of the blade adapted to the particular work required for the roller machines, were not equivalents for anything found in the Crosby & Kellogg, for if there were they could not have been patented. They were additional, distinct and separate improvements, whether or not they were lawfully covered by the reissue.

3d. One of the improved operations of the machine in making the pleats is that of *spacing*. Complainant's witness, F. A. Kursheedt, in stating the advantages of machine-made pleatings over hand-made pleatings, states as follows, referring to the machine-made pleatings:

"The size of the pleats and *spaces* between the pleats are uni-
"form, while with the hand-made goods the pleats are more or less
"crooked or out of line, and the pleats or *spaces* between the pleats
"are irregular and vary in size, thereby presenting an inferior ap-
"pearance to the machine-made pleatings."

Judge WALLACE held that the mechanism for spacing contained in the Crosby & Kellogg Patent was not contained in the defendants' machines, and that the defendants' machines contained no equivalent therefor and did not infringe the claim that covered the Crosby & Kellogg mechanism for spacing. Therefore the use of the mechanism for that important and essential part of the operation in the defendants' machine was not the employment of an equivalent for that contained in the Crosby & Kellogg Patent, and, as Judge WALLACE was not reversed, but affirmed, by the Circuit Court of Appeals, said Court could not ~~lawfully~~ carefully hold that the spacing mechanism in the defendants' machine was performed by the substitution of mere equivalents for those in the Crosby & Kellogg Patent.

Therefore, it appeared that, however useful and essential in the operation of the whole machine, the combinations of the *second* and *fourth* claims of the Crosby & Kellogg Patent may be, yet that the underlying principle contained in all pleating machines was derived from Arnold, and separate, distinct and valuable improvements were derived from Pipo, and an important part of the operation consisting of the spacing, and, finally, the construction of the whole machine and bringing its parts together into a combined whole so as to produce the work for which it is intended, all of which contributed most materially to the profit of using said machine, were all due to other inventors or mechanics than Crosby & Kellogg, and, therefore, it was most manifest error to hold that the defendants' machine was simply the Crosby & Kellogg mechanism with no other separate or distinct invention or improvement, except the heating of the rolls, or that the Crosby & Kellogg invention was the gist of the whole machine, the other features of the machine being simply the form in which the Crosby & Kellogg mechanism was embodied. The life and gist of the machine was derived from James Orr, who first produced it.

The combination of the *second* and *fourth* claims of the Crosby & Kellogg patent cannot make a completed pleat, nor can the whole Crosby & Kellogg machine do the work done by said roller pleating machines.

Second. The said Court erred in finding that the burden of proof lay on the defendants to separate and apportion the amounts of profits and savings arising from the use of their said roller pleating ma-

chines of the features covered by the *second* and *fourth* claims of the Crosby & Kellogg Patent, and the savings and profits arising from the other features of said machines, patented and unpatented.

The Court supported its conclusion in this respect by the authority of *Elizabeth vs. Paving Company*, 97 U. S., 126, and *Crosby Steam Gauge Company vs. Consolidated Safety Valve Company*, 141 U. S., 441. It is submitted that neither case supports the decision of the learned Court.

In *Elizabeth vs. Paving Company* the subject matter of the patent was the Nicholson wooden pavement. One of the defendants, the New Jersey Wood Paving Company, had taken the Nicholson wood pavement as an entirety and laid it down—*i. e.*, sold it to the City of Elizabeth—for $4.50 per square yard. The City of Elizabeth paid the same price—*viz.*, $4.50 per square yard—to the Nicholson Company for the Nicholson pavement. The amount of profit which the N. J. Wood Company made on the sale was about the same as that made by the Nicholson Company. The N. J. Company alleged that they used in their pavement an improvement patented to one Brocklebank and Trainer. Under these circumstances there was no proof that the improvement added anything to the commercial or selling price of the pavement, or contributed in any way to the profit, and the Court merely held that, under such circumstances, the burden of proof lay, as it manifestly did, on the defendants to show that the improvement did, in some way, contribute to the profit. The Court did not say that, if the defendant had shown that *some* part of the profit was due to the improvement, the burden lay on the defendant to *make* the apportionment and determine what that amount was. It simply held that the burden, under the facts of that case, lay upon the defendant to prove that there was *any necessity of any apportionment at all.* The language of the Court is as follows :

" The Nicholson pavement was a complete thing, consisting of a " certain combination of elements. The defendants used it as such— " the whole of it. If they superadded the addition made to it by " Brocklebank & Trainer, they failed to show that such addition " contributed to the profits realized. The burden of proof was on " them to do this. The evidence, if it shows anything, tends to " prove that the addition diminished the profits instead of increas- " ing them ; but it could not have had much influence either way,

" inasmuch as the evidence shows that the profit made on this pave-
" ment was about the same as that made on the pavement of Nichol-
" son without the improvement."

In *Crosby Steam Gauge & Valve Company vs. Consolidated Safety Valve Company*, 141 U. S., 441, the Richardson valve was a complete thing of itself, a commercial article. The profits, as in the case against the paving company, consisted simply in the profit it made on the sale of the article. It was satisfactorily established that the whole commercial value of the valve, so far as it was a marketable article, was due to the peculiarity of its construction covered by the Richardson Patent. The valve contained improvements patented to Crosby, but there was nothing in the case to show or raise the presumption that any part of the price obtained for the valve was due to the features derived from Crosby. The Court held :

" There is no evidence that any of the things patented by Crosby
" gave any advantage in selling the defendants' valve."

In both the cases above cited, the facts as proved either raised no presumption or positively negatived the idea that anything except the patented feature contributed to the profit contained in the *selling price* which was the *sole measure* of profit. In such a case, the burden may lie on the defendant to show that part of the profits was actually due to the improvements, but the said cases do not hold that, where that fact appears from the evidence of either party, the burden of proof lies upon the defendant to make the apportionment.

In the present case there was no taking by the defendants of a complete machine—an entirety. Their machines only embodied *part* of the Crosby & Kellogg machine, constituting, by itself, combinations not capable of useful result except in conjunction with other mechanism *not* taken from Crosby & Kellogg, and it is clearly proved, as has already been shown, that a considerable portion of the profits and, indeed, in view of the testimony introduced by complainants that Orr's machine *created* the article known as machine-made pleatings, that the larger part of said profits were due to other features than those covered by the Crosby & Kellogg Patent. In such case, it is settled law that the rule of *Garretson vs. Clark*, 111 U. S., 120, applies, and that the burden lies upon the plaintiff to show, by sufficient evidence, the actual amount of profits which the defendants have derived from the use of the patented invention.

The language of *Garretson vs. Clark* is as follows:

"The *patentee* must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages, between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature."

In a case like the present no other rule than this is possible. The plaintiff in a patent suit can only recover the *actual* profits which the defendant has made from the use of the patented invention, and where it appears that only a *portion* of the profits derived from the use of a machine is due to the presence in said machine of the patented invention and that the rest of the profits must be clearly attributed to other features, if the plaintiff fails to introduce evidence by which the profit he seeks to recover may be apportioned, he must necessarily fail to prove his case.

Third. The Court erred, wherever the burden of proof lay in estimating the profit at forty thousand dollars, because there is no evidence whatever in the case to justify such estimate.

1st. The only evidence as to the measure of profit was the estimates of the complainant's witnesses, which were wholly insufficient to justify any finding based upon them, and they were properly rejected by the Court. Said estimates afforded no evidence whatever. One witness said that hand pleating, he should estimate, would cost fifteen to twenty-five cents; another seventeen, another twenty; none of said witnesses having sufficient knowledge or experience to make their estimate of any probative force. The case is practically the same as if said evidence had not been given. The learned Court also rejected the evidence of Mrs. Smith, the defendants' forewoman of the department where pleating was done, who was the only person giving an estimate of the cost of hand pleating who was qualified by knowledge, skill and experience to do so. Mrs. Smith only testified to a method of hand pleating which did not include ironing. So far as the question of hand pleating and ironing out the pleats is concerned, the aforesaid estimates of the

complainant's witnesses was the only testimony in the case of any description as to the cost of said operation, and the only evidence affording *any measure* of *profits* whatever.

2d. The said estimate related to a method of hand-pleating which all the complainant's witnesses pronounced inadequate to produce an equally beneficial result with the machine and inadequate to produce an article capable of competition with the article made on the machine.

The rule of *Mowry vs. Whitney*, 14 Wall., 620, 651, which is the accepted rule upon the point, is "what advantage did the defendant "derive from using the complainant's invention over what he had "in using other processes then open to the public and *adequate to* "*enable him to obtain an equally beneficial result.*"

The learned Court below held, notwithstanding this evidence of the complainant's witnesses, that "the conclusion of the Judge of "the Circuit Court that a marketable article of pleatings could not "be made by hand does not seem to have been adequately sup-"ported by the testimony. It appears that the defendant gener-"ally pleated silk and dress goods and woolen goods by hand, be-"cause the machine injured the fine goods, and when, after the in-"junction, hand-made pleating was used upon ordinary suits, there "was no difference in the appearance of the two classes of finished "work."

The silk and dress goods and the few woolen goods which the defendants pleated by hand were not ironed out and were not made by the method of hand-pleating which was taken as the measure of comparison, which said ironing out was necessary for the linen and ordinary goods pleated on the machine, and the learned Circuit Court of Appeals is, as stated, in error in the statement that "after the "injunction hand-made pleating was used upon ordinary suits."

The only pleating that was used after the injunction was pleating, which the defendant sent out and had done at a pleating establishment for a half cent a yard and which could only at such a price be made on a machine. With this exception, after the injunction the defendants employed different trimmings.

3d. With the exception of such rejected estimates there is no proof in the case of any *measure* of profit made by the defendants. With this evidence rejected, as the Court did reject it, the findings

of the said learned Court that "the whole record and the silence of "the defendants show that they must be properly charged with a "large sum of profits," cannot, it is submitted, be supported by the proofs.

FOURTEENTH. That, as the result of the foregoing facts and considerations, your petitioners respectfully submit, that being merchants of the City of New York purchasing and using in their business machines bought and used in good faith and without knowledge of the claim put forward in this suit that the said machines embraced any of the inventions covered by the said Crosby & Kellogg Patent, they have been adjudged to pay a sum as profits which they never actually saved or received, and the amount fixed by said judgment is not supported by evidence.

And, in support of this conclusion, your petitioners submit, by way of summary, that the following propositions are positively established by the record herein and the settled rules of law relating to the recovery of profits in patent causes :

First. A considerable portion of the profits made by the use of the infringing machines was due to the presence in said machines of devices and features, patented and unpatented, separate from and in addition to the inventions covered by the *second* and *fourth* claims of the Crosby & Kellogg Patent, which the defendants were adjudged to infringe.

Second. That the combinations of said *second* and *fourth* claims did not constitute a complete machine, but only parts of a machine, and were not capable, by themselves, of producing the pleatings which were made on defendants' machine, or any other complete merchantable article, but were merely adapted and used to perform certain particular steps in the process of manufacturing said pleatings by machinery.

Third. That until the invention of Orr, nearly six years after the date of the Crosby & Kellogg Patent, no machine was known to the art capable of producing the pleatings made upon the said roller-pleating or Orr machines used by the defendants, and said pleatings, prior to the invention of Orr, were unknown as articles of commerce.

Fourth. That, under these circumstances, the complainant was

not entitled to recover the entire profits arising from the use of said machines, some features only of which were covered by the Crosby & Kellogg Patent, but only such part of said profits as was due to the particular features in said machines so covered by the said patent in suit.

Fifth. That, in such case, the law is clearly settled by this Court that the burden of proof lies upon the patentee to separate or apportion, by reliable and tangible evidence, the profits due to the features covered by his patent and those arising from other inventions or improvements which the machine may contain.

Sixth. That, in this case, there was no evidence whatever tending to separate and apportion the profits due to the presence in the defendants' machine of the Crosby & Kellogg inventions and those due to the other inventions and improvements contained in said machines.

Seventh:

(a) That it is admitted and found in this case that there were no damages, and the sole recovery is for the defendants' profits.

(b) That the sole profits claimed or sought to be proved consist of the difference in cost between the use of the machines in making pleatings and hand labor.

(c) That a principal part of said hand labor consisted in ironing out each pleat by hand.

(d) That all of complainant's witnesses who gave evidence on the subject unanimously testified that the process of making and ironing out said pleats by hand was inadequate to produce any equally beneficial result with that accomplished by said machines, and that the product of said hand labor could not compete in quality with the product of said machines or be made to serve commercially as a substitute therefor.

(e) That the only evidence in the case as to the cost of said ironed-out hand pleatings consisted in certain estimates by complainant's witnesses, which were merely conjectural and wholly insufficient to afford the basis of any accounting, and as such were rejected by the Court.

(f) That the Court also rejected the testimony of defendants' forewoman as to the cost of hand pleating without ironing.

(g) That on the foregoing state of the proofs, even if the defendants were liable to this complainant for the entire profits arising from the use of said infringing machines, there was no evidence whatever by which it was possible to compute the cost of hand pleating, which was adopted as the standard of comparison with machine work, and, consequently, absolutely no evidence whatever in the case as to the amount of savings made by the defendants by the use of the patented mechanism.

(h) That, in view of said foregoing facts, the Circuit Court of Appeals' estimate of the amount of defendants' supposed profits at forty thousand dollars cannot be sustained.

And your petitioners respectfully show that this decision is not only a hardship to them, but proceeds upon an erroneous interpretation of the rules of law, and involves questions of the highest gravity and importance, affecting the constitutional and fundamental rights of the citizens of the country, and that it is of moment that this Honorable Court should definitely settle the law in relation to recoveries in patent causes which the learned Court of Appeals in this case has, it is submitted, misapprehended especially in the following particulars:

First.

Whereas the law, as enunciated in *Garretson vs. Clark* (111 U. S., 120), and since then followed and applied by this Court in many cases, establishes the rule that, where it clearly appears that *some part* of the profit arising from the use of a machine containing a patented improvement, which is the subject of suit, arises from other devices and improvements patented or unpatented, the burden of proof lies on the complainant in such suit to separate or apportion the profits due to the patent in suit from those derived from said other sources, said Court of Appeals has held that, although it clearly appeared that only part of the profits arising from the use of the machines in controversy in this suit arose from features of said machines not covered by complainant's patent, that, nevertheless, the burden lay on the *defend-*

ants to furnish satisfactory and reliable proof of the *amount* of said profits derived from sources not covered by complainant's patent.

Second.

The said Circuit Court of Appeals, having determined that there should be an apportionment of profits, and there being no evidence whatever, general or particular, as to the proportion of said profits attributable to the features of defendants' machine covered by the patent in suit and the features not covered by said patent, it was erroneous to fix said apportionment at forty thousand dollars.

Third.

That the rule established by this Court in the case of *Mowry vs. Whitney* (14 Wall., 651), as to the method of calculating profits by savings, namely, "what advantage did the defendant de-"rive from using the complainant's invention over what he "had in using other processes then open to the public and "*adequate to enable him to obtain an equally beneficial result*," properly construed must be held to mean, that the alternative method which the infringer might have used should be a method known to the art and, at least, sufficiently practicable to have been a reasonable alternative and not a method alleged to be impracticable, and so costly and inferior in result to the patented method as to make it unreasonable and extravagant to presume that the defendants would have resorted to such alternative means or process. To put any other interpretation disregards the qualification therein expressed that the said method or process should be adequate to produce an equally beneficial result and would lead to a comparison between the cost of the use of patented machines or processes and mere theoretical methods of attempting to do the same thing which would justify the finding, not of actual profits, but of imaginary profits which might be positively ruinous to a defendant and beyond any recovery justified by the most elementary rules of legal redress for an injury.

Fourth.

That, as your petitioners are informed and believe, the decision in this case is generally held by the profession and the Courts to have materially modified the law as heretofore understood, and, as

an instance of this, they assign the case now pending in the United States Circuit Court for the Southern District of New York, of *Hohorst vs. Hamburg-American Packet Company*, in which a decree was rendered for the complainant for the infringement of a patent for certain slings for packages used in loading steamships, and which was referred, by the ordinary decree, to the master for an accounting. On exceptions to the master's report the following decision has lately been filed by his Honor Judge COXE, sitting as Circuit Judge:

"In Equity.

"On Exceptions to Master's Report.

"CHARLES H. DEMOND for the complainant.

"WALTER D. EDMONDS for the defendants.

COXE, J.:

"On the 15th of May, 1896, the Master filed his report in which "he says, *inter alia*:

"'I am convinced that the complainant has not made out a case "'entitling him to a recovery of profits within the rule applicable "'to this subject. I cannot make, as complainant suggests, "an "'"approximate calculation" on the evidence. I can be no better "'satisfied that five or ten or twenty per cent. of certain goods were "'handled by the nets than two-thirds were so handled. If, there-"'fore, I should report that complainant has shown profits made "'by defendant on the basis of a given proportion of certain goods "'handled, and a given proportion of time saved in handling them, "'such report would be based on the merest haphazard speculation. "'I do not consider that I am justified in making such conjectures' "(citing Robinson on Patents, Vol. 3, pp. 522-3).

"Accordingly he found that the complainant is entitled to re-"cover nothing by way of profits and nominal damages only.

"On the 29th of July thereafter, the Circuit Court of Appeals "announced its decision in *Tuttle vs. Claflin*, 76 Fed. Rep., 227.

"It is agreed on all sides that this is 'a closely analogous case' "to the one at bar, and that the law as there enunciated is now the "rule in the Second Circuit.

"The Court has been considerably perplexed as to the proper "disposition of the case in view of this decision. After careful "consideration it is thought fair to the learned Master and just to "all parties concerned to refer the accounting against the Master "with the suggestion that he follow the rule of *Tuttle vs. Claflin* and "take such further action in the matter as he may deem proper."

And your petitioners further cite the case of *Campbell vs. The Mayor, etc.*, of the *City of New York*, now pending and undecided on the issue raised by exceptions to the Master's report in the Circuit Court for the Southern District of New York, and which was argued on such exceptions after the decision of the Court of Appeals in this case, and in which, as your petitioners are informed, a claim of recovery of upwards of eleven million of dollars is made against the said city, on the ground of profits received from the use of a certain valve used in fire engines, and it was argued on the hearing of such exceptions that one engine with the valves was more efficient than two without it, and, therefore, that the profit of the city was what it would cost to double its entire fire department, and that evidence that said doubling would be impracticable and would not produce a result as beneficial as that obtained by the use of the valve was immaterial.

And your petitioners respectfully submit, that if the rule adopted by the learned Court in this case is allowed to stand as a precedent, it will lead to most serious confusion, and will leave citizens, who may have innocently infringed a patent, liable to a judgment against them for supposed profits, upon estimates without sufficient foundation in the proofs.

That the property interests thus liable to be affected are vast in amount and affect pending patent suits in which the United States Government is concerned as well as private citizens; that if profits can be measured and their amount ascertained in patent causes by an estimate having only such foundation in the evidence as is found in this case, the same rule must apply in all cases where a recovery of profits is sought and where evidence is required as to their amount, and your petitioners respectfully submit that it is of the highest public interest and importance that the questions raised by the judgment in this case be examined and settled by this Court.

And your petitioners submit that they are, by reason of the premises, injured by the decree of the said Circuit Court of Appeals herein.

FIFTEENTH. Your petitioners, therefore, respectfully submit that the questions thus involved in and presented by the case of your petitioners should be authoritatively and finally adjudged by this Honorable Court upon and after a full presentation to the Court upon the merits of the same, both by reason of the gravity

and importance of said questions, and because it is the peculiar and pre-eminent province of this Honorable Court to finally determine all questions involving the construction or application of the Patent Laws of the United States.

WHEREFORE, your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein, designated a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled Theodore A. Tuttle, as Trustee in Insolvency of the Elm City Company, as appellant, *versus* John Claflin, as executor, *etc.*, appellees, , to the end that the said case may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals, and to define and to regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said judgment of the Circuit Court of Appeals in the said case may be reversed by this honorable Court.

And your petitioners will ever pray, &c.

JOHN CLAFLIN,
EDWARD E. EAMES,
HORACE J. FAIRCHILD,
DEXTER FORCE,
DANIEL ROBINSON,
By EDMUND WETMORE,
Counsel for Petitioners.

EDMUND WETMORE,
CHARLES W. GOULD,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK, City and County of New York, } ss. :

JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE ~~and DANIEL ROBINSON~~, being duly sworn, say that they are the petitioners in the foregoing petition; that they have read the foregoing petition and know the contents thereof, and that the same is true of their own knowledge, except as to the matters therein stated upon information and belief, and as to those matters they believe it to be true.

JOHN CLAFLIN.
EDWARD E. EAMES.
HORACE J. FAIRCHILD.
D. N. FORCE.

Subscribed and sworn to before me this 9th day of March, 1897.

MORTIMER F. DRUDY,
[L. S.] Notary Public,
Kings County.

Certificate filed in New York County

~~DAN'L ROBINSON.~~

~~Subscribed and sworn to before me as to Daniel Robinson this 10th day of March, 1897.~~

~~R. EMMET DOHERTY,~~
~~[L. S.]~~ Notary Public,
New York County.

The following certificate is presented in support of the allegation on page 82 of the printed copy of the foregoing petition

IN THE SUPREME COURT OF THE UNITED STATES.

Ex parte

JOHN CLAFLIN, as Executor of Horace B. Claflin, deceased, JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER FORCE and DANIEL ROBINSON,

Defendants.

TO THE SUPREME COURT OF THE UNITED STATES:

I hereby certify to this Honorable Court that several suits are pending against the City of New York, in which claims for profits are made, aggregating over eleven millions of dollars, and that in regard to the conduct and defense of those suits, and for the protection of the interests of the said city, it is of great moment to receive the instruction of this Court upon the questions raised by the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *Tuttle vs. Claflin*, as to the proper course to be followed in the ascertainment of profit, and it will be of benefit to me in the conduct of my department as legal adviser of the city if your honorable body shall bring the said case of *Tuttle vs. Claflin* to this Court for review.

FRANCIS M. SCOTT,
Counsel to the Corporation.

Office Supreme Court, U. S.
FILED.
MAR 29 1897
JAMES H. McKENNEY,
CLERK.

166-121

763

IN THE

Supreme Court of the United States.

October Term, 1896.

Ex parte JOHN CLAFLIN, as Executor, etc., *et al.*,
Petitioners.

Answer of Theodore A. Tuttle to Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

B. F. LEE,
Of Counsel for Respondent.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1896.

Ex parte JOHN CLAFLIN, as Executor of HORACE B. CLAFLIN, deceased; JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE and DANIEL ROBINSON,
Petitioners.

Answer of Theodore A. Tuttle, as Trustee in Insolvency of the Elm City Company, to the petition for writ of certiorari, requiring the Circuit Court of Appeals for the Second Circuit to certify to this Court for its review and determination, the case of Theodore A. Tuttle, as Trustee in Insolvency of the Elm City Company, complainant and appellant, *versus* John Claflin, as executor of Horace B. Claflin, deceased; John Claflin, Edward E. Eames, Horace J. Fairchild, Dexter N. Force and Daniel Robinson, defendants and appellees.

I.—This respondent admits the truth of the allegations contained in the first and second paragraphs of said petition.

II.—This respondent, as to the third paragraph of said petition, denies that the same correctly describes the invention for which the patent in suit was issued, and he denies that the facts as to the infringement of said patent set forth in said paragraph are correctly set forth therein, as will fully appear by reference to the infringing machines, made exhibits in the cause and to the evidence relating thereto contained in the record, and to the opinions filed in the Circuit Court on the 10th day of March, 1884 (Rec., p. 63), on the 15th day of March, 1894 (Rec., p. 404), and the opinions filed in the Circuit Court of Appeals on the 29th day of July, 1896, and on the 23d day of February, 1897.

III.—This respondent, as to the fourth paragraph of said petition, admits that the proceedings set forth in said paragraph of said petition were had in said cause, whereby the master filed his report on August 26, 1893, awarding to the complainant the sum of $76,215.85 as profits; but this respondent alleges that an interlocutory injunction was ordered by his Honor Judge Blatchford on the 15th day of November, 1878, after a hearing upon the merits (Rec., p. 9).

IV.—This respondent, as to the fifth paragraph of said petition, admits that the proceedings set forth in said paragraph of said petition were had in said cause; but this respondent denies that the substance of the decisions of the said Circuit Court of Appeals is correctly set forth in said paragraph, as will more fully appear by reference to said decisions, and particularly to the one filed on the 23d day of February, 1897.

V.—This respondent, as to the sixth paragraph of said petition, denies that the material evidence before the Master, relating to alleged profits by savings, was

in substance as set forth in said paragraph of said petition, as by reference to the evidence before the Master and the Master's report contained in the record will fully appear; and he denies that the rulings of the Court in relation to said testimony are correctly set forth in said paragraph of said petition, and he refers to the Master's report and to the decisions of the Circuit Court of Appeals, filed respectively on the 29th day of July, 1896, and the 23d day of February, 1897, for a correct statement of said rulings.

VI.—This respondent, as to the seventh paragraph of said petition denies that the evidence set forth in the sixth paragraph of said petition was the only evidence in the case tending to show any profits of any sort received or made by the defendants by the use of said infringing machines.

VII.—This respondent, as to the eighth paragraph of said petition, denies that the facts in relation to the granting of license fees and settlements for past infringement by the owners of the patent in suit, are correctly set forth in said eighth paragraph of said petition, and he particularly denies that the evidence relating to the same is correctly quoted, and he alleges that the quoted testimony comprising 7 Q. and the answer thereto of the deposition of Alexander E. Kursheedt, forms no part of the record in this cause, but on the contrary was stricken out, as will appear by reference to page 155 of the record between interrogatories 11 and 12; and he further alleges that the petitioner has omitted from the said eighth paragraph of said petition, all reference to the testimony of said Alexander E. Kursheedt in his second deposition, where he proves that his concern paid $7,500 for the privilege of using the invention of the patent in suit,

and that the number of machines used by them did not exceed half a dozen in use at one time, as by reference to page 248 of the record 115 ReXQ. and 116 ReXQ. of said deposition will more fully appear.

VIII.—This respondent, as to the ninth paragraph of said petition, admits the statements contained therein, but denies that it contains a full and complete statement of the means adopted by the Master in arriving at his conclusion, and he therefore prays to refer to the Master's report (Rec., p. 67).

IX.—This respondent, as to the tenth paragraph of said petition, admits that his Honor Judge Coxe set the Master's report aside, but as to the grounds of such decision, he denies that they are correctly set forth in said tenth paragraph, and he therefore prays a reference to said decision (Rec., p. 402).

X.—This respondent, as to the eleventh paragraph of said petition, denies that it contains a full, complete and accurate statement of the grounds upon which the Circuit Court of Appeals based its final decree, and he therefore prays a reference to said decisions of said Circuit Court of Appeals, filed respectively on the 29th day of July, 1896, and the 23d day of February, 1897.

XI.—This respondent, as to the twelfth paragraph of said petition, denies that the facts therein alleged are correctly set forth, and he therefore prays a reference to the pleadings and the proofs having a bearing upon the subject referred to in the said twelfth paragraph of said petition.

XII.—This respondent, as to the thirteenth paragraph of said petition, denies that any of the assign-

ments of error contained in said paragraph are well founded in point of law or fact.

XIII.—This respondent, as to the fourteenth paragraph of said petition, denies that the use by the defendants of the machines held to be infringements, was in good faith and without notice of the complainant's rights. But on the contrary, this respondent alleges that the defendants continued to use the said machines long after notice of the infringement, long after the bill was filed, and long after the service of the interlocutory injunction upon them, and that the following facts appear by uncontradicted evidence in the record: Suit was begun on August 1, 1878 (fol. 1778). After that the use of the machines was resumed for one month in the fall of 1878 (fol. 324). Judge Blatchford, after hearing counsel for defendants, granted an interlocutory injunction on November 18, 1878 (fols. 1778, 34). The injunction was personally served on all the defendants except Fairchild, and the writ was returned and filed in the Clerk's Office on January 6, 1879 (fol. 1779). The machines were again used by the defendants for three months in the spring of 1879—in March, April and May (fol. 324). The patent expired December 2, 1879. This defendant further denies the correctness of the several statements of fact and law, and mixed statements of law and fact, contained in the seven sub-paragraphs of said fourteenth paragraph of said petition, said sub-paragraphs being numbered first, second, third, fourth, fifth, sixth and seventh. And he further denies that the decision of said Circuit Court of Appeals is a hardship to the petitioner, but on the contrary he alleges that the facts proved before the Master warranted the confirmation of the Master's report for $76,215.85, with interest from the date of the filing of said report, Au-

gust 26, 1893. And he further denies that said decision of the Circuit Court of Appeals proceeds upon an erroneous interpretation of the rules of law, and involves questions of the highest gravity and importance, and that it is important that this Honorable Court should consider this cause; but on the contrary he alleges that said decision involves issues of fact only and no new rule of law, as is stated in said opinion of said Circuit Court of Appeals, filed on the 23d day of February, 1897 (78 O. G., 1740). And your petitioner further denies that the decision of this case has generally been held by the profession and the Courts to have materially modified the law as heretofore understood; and he alleges that the memorandum by Judge Coxe, referred to near the end of said paragraph fourteen of said petition, was filed before the second opinion of the Circuit Court of Appeals, filed herein on February 23, 1897, upon the rehearing of this cause before said Court.

XIV.—This respondent, as to the fifteenth paragraph of said petition, denies that the questions involved in and presented by this case are of gravity and importance and of any interest except to the parties to this cause, and he alleges that the rules of law laid down in this case are familiar; and he further alleges that as the patent expired on December 2, 1879, the public have no longer any interest in any question relating to its validity or the construction of its claims.

XV.—This respondent further alleges that the only error in the final decree of the Circuit Court of Appeals was in reducing the amount of the complainant's recovery to $40,000, with interest from July 29, 1896, and in not ordering a decree for the complainant for the sum of $76,215.85, with interest thereon from the 26th day of August, 1893, being the date of the filing of the Master's report.

XVI—This respondent alleges that the mandate of the Circuit Court of Appeals was issued out of and under the seal of said Circuit Court of Appeals for the Second Circuit on the 26th day of March, 1897, pursuant to said final decree, and the decree of the Circuit Court in obedience thereto was made and entered on the 27th day of March, 1897.

WHEREFORE, this respondent denies that the petitioners are entitled to have the prayer of said petition granted, and without this that there is any other matter, cause or thing in said petition contained, material or necessary for the respondent to make answer unto and not hereinbefore sufficiently answered, confessed traversed, denied or avoided, is true to the knowledge or belief of this respondent.

This respondent, therefore, prays

1. That this application for a writ of *certiorari* be denied.

2. That in case it is granted, that leave be given to the complainant to join in proceedings under the same in the nature of a cross appeal, to the end that this Court may reverse or modify the decree of the Circuit Court of Appeals, and award to the complainant a larger sum than was awarded to him by the final decree of said Court, and may confirm the said Master's Report and award to the complainant the sum of $76,215.85, with interest thereon from the 26th day of August, 1893.

THEODORE A. TUTTLE,
As Trustee, &c.

By W. T. B. MILLIKEN,
His Solicitor.

B. F. LEE,
Of Counsel.

State, City and County of New York, ss.:

WILLIAM T. B. MILLIKEN, being duly sworn, deposes and says that he is solicitor for the complainant in the suit of Theodore A. Tuttle, as trustee, etc., versus John Claflin, executor, etc., *et al.*, mentioned in the foregoing petition; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein alleged upon information and belief and as to those matters he believes it to be true; that the reason why this verification is made by deponent and not by said Theodore A. Tuttle, as trustee, etc., is because said Tuttle is not within the Southern District of New York, where deponent resides and has his place of business, and capable of making this affidavit; that the source of deponent's knowledge and grounds of his belief as to matters in said answer not stated upon knowledge are that for many years past he has been solicitor for the complainant in said suit; that he has frequently been in communication with counsel in reference to the arguments that have taken place herein, and in constant communication with the agent of the complainant who has had charge of this litigation, the plaintiff being a non-resident, and has carefully followed all the proceedings had therein.

W. T. B. MILLIKEN.

Subscribed and sworn to before me, this 27th day of March, 1897.

HOWARD THAYER KINGSBURY,
[SEAL.] Notary Public,
New York County.

166-721

763

Office Supreme Court, U. S.
FILED
MAR 29 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

Ex parte

JOHN CLAFLIN, as Executor of Horace B. Claflin, deceased; JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER FORCE and DANIEL ROBINSON,

Defendants.

Brief in Support of Petition for Certiorari to the Circuit Court of Appeals for the Second Circuit to Review the Case of Theodore A. Tuttle, as Trustee in Insolvency, *vs.* John Claflin, as Executor of Horace B. Claflin, deceased, et al.

EDMUND WETMORE,
CHARLES W. GOULD,
Counsel for Petitioners.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

In the Supreme Court of the United States.

Ex parte.

JOHN CLAFLIN, as Executor of Horace B. Claflin, deceased; JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER FORCE and DANIEL ROBINSON,

Defendants.

Brief in support of petition for certiorari to the Circuit Court of Appeals for the Second Circuit to review the case of Theodore A. Tuttle, as trustee in insolvency, vs. John Claflin, as executor of Horace B. Claflin, deceased, et al.

The petitioners have prayed for a review by this Court of the decision of the Circuit Court of Appeals of the Second Circuit in the case of *Tuttle vs. Claflin*, in which the petitioners are defendants, not only because of the hardship which said decision inflicts upon them, but because the said decision, in that important branch of the Federal law which relates to patents for inventions, is, if the views herein stated are sound, at variance with the rules established by this Court in regard to recoveries in such cases, establishes a precedent which affects vast property interests and presents questions which, for the protection of the citizen, should be definitely determined by this Court.

The question presented is, briefly, this: whether, where a defendant has used a machine containing combinations of mechanism

covered by a patent, and thereby made a saving in labor, *part* of which saving is due, and is found by the Court to be due, to features not covered by the patent, and there is no evidence in the case as to any apportionment or separation of the amount of said profit or saving due to the features covered by the patent, and no evidence of *any* amount of profits derived from the use of the machine, except mere estimates of witnesses of so unfounded and conjectural a character that they are rejected by the Court; can the Court, in the absence of any other evidence, properly fix the amount of profits which the defendant is adjudged to pay?

And, further, where the measure of profit or saving is the difference between the cost of using the machine and the supposed cost of hand labor, can such hand labor be taken as the measure of profit upon evidence offered by the complainant that it is so costly that it could not be used except at a loss, and is incapable of producing a result which can be used as a commercial substitute for the product of the machine—can hand labor, under such circumstances, be used as a standard by which to measure profits by way of savings made by the use of the machine, and is any significance to be attributed to the words "adequate to produce "an equally beneficial result" in the rule as to the measure of profits by savings laid down by this Court in *Mowry vs. Whitney*, (14 Wall., 620, 651) and frequently reaffirmed, which rule is as follows:

"What advantage did the defendant derive from using the com-"plainant's invention over what he had in using other processes "then open to the public and adequate to enable him to obtain an "equally beneficial result?"

That the case raises the foregoing questions appears from a brief summary of facts concerning which there is no dispute.

I.

The roller pleating machines used by the defendants performed the operation of pressing and ironing out the pleats by means not derived from the Crosby & Kellogg Patent, and therein made a

saving over hand labor, characterized by the Court as "of pecuniary "importance and benefit," and one which should be deducted from the whole savings before the amount attributable to the Crosby & Kellogg Patent could be computed, as was also held by the Court which found "that so much of the cost of making pleats by hand as "included the cost of ironing should be deducted from the savings "which the Master found were derived from the use of the "infringing mechanism." For the present, the fact is passed over that, besides the mechanism for pressing and ironing, the defendants' machines contained other inventions and improvements, including the Arnold and Pipo inventions, and the important Orr invention and other devices that contributed largely to the savings, but which the Circuit Court of Appeals held could not be taken into account. It is enough for the purposes of the point here made that it is admitted and found as a fact that a considerable portion of the savings were *not* due to the Crosby & Kellogg Patent, setting aside, for the moment, the question that a larger proportion of said savings were due to the features not covered by the Crosby & Kellogg Patent than was actually admitted by the Court.

It is, also, an admitted fact that the only profits claimed, or attempted to be proved, by the complainant consisted in the difference of cost between producing the pleatings which were made on the defendants' machines by the use of said machines and doing the same work by hand. This profit could only be ascertained by ascertaining the cost of so doing the said work by hand, and whether the whole of said profit belonged to the complainant, or only a part of it; whether the burden of showing what part belonged to the Crosby & Kellogg Patent and what part belonged to features of the machine not covered by said Crosby & Kellogg Patent lay upon the complainant or on the defendants, there could be no finding of profits in any case, whether for the whole or for a part, which was not based upon "reliable and tangible" evidence. Such finding cannot be sustained on mere conjectural estimates. This is elementary, and never departed from in any case. In the case of *Coupe vs. Royer*, 155 U. S., 565, in this Court, the evidence offered by the plaintiff to prove the defendant's gains is thus stated in the opinion of the Court: After proving that the defendants had treated upon the machines alleged to infringe 66,000 hides, "They," the plaintiffs, "also called Herman Royer, one of the plaintiffs, who testified

" that, in his opinion, there would be a saving of $4 or $5 a hide " by using his machine over what it would cost to soften hides by " any other method, and that he knew that the difference between " the cost of softening the raw hides by mechanical action in his " machine and doing the same work by hand or by any other de- " vices known would be more than one dollar a hide."

Commenting on this testimony and the instruction given by the Judge at the trial, which was *inter alia*, that the jury might make up their verdict on the basis of Royer's estimate if they believed his testimony to be sound, Mr. Justice SHIRAS, giving the opinion of this Court, says :

" Nor even if the defendant's gains were the measure of his " liability, did the evidence justify the instruction, because that " evidence tended to show what Royer estimated what the de- " fendants' profits might have been and not what they actually " were."

Now, in this case, it is sufficient to say that the only evidence offered as to the cost of making and ironing out the pleats by hand was that of estimates made by the complainant's witnesses which were based on no sufficient knowledge, experience or trial. The Court itself so held, saying that these estimates " are in our opinion, the result either of inaccurate knowl- " edge, or of an insufficient investigation of the expenses of work " on a large scale." One of the defendants' witnesses gave her estimate of the cost of pleating certain goods by hand without ironing, but, as this left out the ironing which was an important item of the expense it could not be compared with the estimates of complainant's witnesses, and was thrown out by the Court for the same reason that applied to said last-named estimates. Now, upon this state of the proof, what evidence was there that would justify the Court in finding *any* amount of profits in dollars and cents. The Court finds that upon " the whole record " the defendants " must properly " be charged with a large sum as profits." How does " the whole " record " show that fact? The foregoing evidence *is* the whole record, so far as relates to any data by which any particular sum actually saved as profits can be computed. The record shows that there was an economy in using the machines, a part but not the whole of which was due to the presence therein of certain combinations of mechanism covered by the Crosby & Kellogg Patent. What those savings amounted to reduced to a money value could be ascertained only by ascertaining the cost of

hand pleating. Now, save the rejected estimates there is absolutely *no* evidence in the case as to the said cost of hand pleating. The estimates merely give the opinion or conjecture of the witness as to said cost in bulk. Strike those estimates out and there is not one fact in the case, there are no data, no statistics, absolutely nothing from which it can be proved that the cost of making and ironing out pleats by hand is established. Under such circumstances, it is not allowable to say that the estimates appear too large, and, therefore, they may be arbitrarily cut down, and when reduced, accepted as proof. It may be that they appear too large, and that it is difficult to understand how the most laborious process of ironing out pleats by hand could cost so much, but there is no *proof* on the subject one way or the other. Arbitrarily reducing the amount of said estimates does not, of itself, in the least reduce their uncertainty. If they are not good evidence at their face value, in the absence of any other proof as to cost, they are not good for anything. To say that they are too uncertain to be adopted as the measure of savings, and then arbitrarily to fix those savings at forty thousand dollars, is not essentially different from finding said sum of forty thousand dollars with said estimates out of the case. They cannot be adopted as a kind of limit within which it is permitted to speculate as to the amount of profits. If the learned Court had found fifty thousand dollars, or twenty thousand dollars, or ten thousand dollars, the proof would have been just as strong in support of that finding as it is of the finding of forty thousand dollars.

It cannot be that such a discretion is vested in the Court in determining a fact to be affirmatively established by legal and sufficient evidence.

II.

The Court of Appeals also erred in adopting hand pleating, as the same was proved in this case, as furnishing any standard at all by which to calculate profits.

The rule, already referred to, first enunciated in *Mowry vs. Whitney* has been repeatedly confirmed *ipsissimus verbis* by this Court. The following is the language of the Court in *Tilghman vs.*

Proctor, 125 U. S., 137, where the whole question was elaborately considered :

" The infringer is liable for actual, not for possible, gains. The " profits, therefore, which he must account for are not those which " he might reasonably have made, but those which he did make, by " the use of the plaintiff's invention ; or, in other words, the fruits " of the advantage which he derived from the use of that invention " over what he would have had in using other means then open to " the public and adequate to enable him to obtain an equally bene- " ficial result. If there was no such advantage in his use of the " plaintiff's invention, there can be no decree for profits, and the " plaintiff's only remedy is by an action at law for damages."

Now, no unreasonable or extravagant interpretation is claimed for this rule, but the qualification " adequate to obtain an equally " beneficial result " is not *meaningless*. The rule is based on the fact that where a substitute exists in the art for a patented process, adequate to accomplish the result which the patented process accomplishes, but more expensive, the savings in favor of the patent may be calculated by the difference in cost between the two ; but this, of course, presumes that such a substitute exists, and unless it does the *same thing*, unless it accomplishes substantially the same ***result***, so that in the art it could be used in place of the other, it is ***not*** a substitute, and affords no standard of comparison.

Take this case as an example, and considering the materials for seven-eighths of the pleating done upon defendant's machines, which were for ordinary suits and adapted for machine-made pleatings. Wooster testifies that pleating made and ironed out by hand " could " not be manufactured at any cost to compete in quality with the " same kind of pleatings made by machine." Alexander E. Kursheedt testifies that " it is impossible to make more than a rough imitation " of side plaiting " (the pleating done by the machine) " by hand."

These are the complainant's witnesses, and he could not, and did not, attempt to dispute their testimony, and it was corroborated by those of the other witnesses examined by the complainant as to the same point. But if the result of making and ironing out pleats by hand was so inferior to that produced by the machine that pleats so made by hand could not " compete in quality " with those made by the machine, how could Claflin & Company use such hand-made pleatings ? How could one of the leading houses in the country afford to offer inferior goods for sale ? Who would buy them ? What retailer would buy goods that could not " compete in quality "

with similar goods properly made, or put on his counter side pleating that was only a "rough imitation of machine-made goods?" The Court assumes that Claflin & Company might have made and sold the goods at a loss rather than not furnish goods trimmed in a style then in demand. The evidence, it is submitted, does not warrant the presumption, but far less does it warrant the presumption that they would have incurred the much greater loss to their reputation and business which would have been incurred by offering inferior and second-class goods that nobody would buy. The complainant has endeavored to set up a standard which, on his own proof, was not adequate to produce an equally beneficial result, or even one so nearly equal that it could be used as a substitute.

In the effort to make out a large sum of imaginary profits he has not taken any means to show what, if any, the actual profits were. The theory he atttempted to apply has no application to the case.

It is no answer to this that there were some materials that could be, and were, pleated by hand by the defendants without being finished or ironed, and in this condition were available for use. Without the ironing, these were a different species of pleating, lacking the finish and set given by the ironing process. Silk was one of the materials of which these pleatings were made, a material not suitable to be employed as one out of which machine-made pleatings could be made, as the machine injured the goods; and some woolens were also made into the unironed pleatings by hand, woolens also being a material which it was difficult to make into machine-made pleatings. The characteristic feature of the work on the machine was its regularity and uniform spaces, and the sharp-edged parallel folds pressed down by the heavy rollers acting as a mangle. To produce this effect, according to the only testimony upon the point in the case, the testimony of the complainant's own witnesses, and which he could not repudiate, and did not attempt to repudiate, it is necessary to use the machine, and hand-ironing will not accomplish it, so that, for the pleatings made of linen, percale; and, similar goods which embraced seven-eighths of the goods made by the defendants upon the machines, there was, upon the evidence in the case, no substitute that could be produced by hand labor, and whatever the materials used to make the hand-pleatings, it was impossible to produce ironed pleatings which could compete in quality with the pleatings made and ironed by the machine.

The learned Court seemed to overlook the fact that the pleating referred to by Mrs. Smith was hand pleating, done upon the sewing

machine with no attempt to iron out (Rec., p. 104). Now this unironed pleating, as above stated, was suitable for certain materials, *viz*, silk dress goods and some kinds of woolens. The plaintiff gave no evidence whatever, not even an estimate of the cost of pleating without ironing. The defendants gave no evidence as to the cost of ironing pleatings. The machine ironed the pleatings and the only standard by which it was attempted to prove the savings made by the machine was that of pleatings ironed by hand, and the only evidence of the cost of that work consisted of the imperfect and unreliable estimates of plaintiff's witnesses. There is no proof or attempt to prove that any one, the defendants or any one else, ever used the method of hand-pleating proposed by the plaintiff and adopted by the Court as the standard by which savings were to be measured—namely, the method in which, as stated in the opinion of the Court, " it would have been necessary to press down each fold " with a hot iron as soon as made."

Therefore, there is no foundation for the suggestion that the plaintiff gave estimates (which the Court found wholly unreliable) of the cost of hand pleating, running from fifteen to twenty-five cents a yard, and the defendants gave an estimate (which the Court also rejected as unreliable) amounting to (five minutes a yard, with labor at $5 a week, nine hours a day [Rec., p. 102]) about eighty-five one-hundredths of a cent a yard, and that an average might be taken between the two, not only because, as already shown, if the estimates are too uncertain to be accepted they are worthless as evidence for any purpose; because they are not estimates of the *same thing*—one is ironed and the other is not. One is peculiar to one set of materials and the other to a different set of materials, and, if pleatings that were not ironed were taken as the standard for all goods, then there was absolutely no evidence in the case as to their cost except that given by Mrs. Smith, for the plaintiff's witnesses testified only as to the cost of ironed pleatings, and if Mrs. Smith's testimony was rejected —as it was, there was absolutely no proof to support a recovery of $40,000; and, if it was accepted, it would not justify a recovery of a tenth part of $40,000.

III.

The Court also erred in finding that the burden of proof lay upon the defendants to show what portion of the profits or savings arising from the use of the machine was due to features therein not covered by the complainant's patent. The reasoning of the Court upon this point seems to be as follows:

That the Crosby & Kellogg invention "being one of an original "and primary character," the defendants "took it as it was," and, "although they furnished their machines with mechanical equiva- "lents which might produce better work than the corresponding de- "vices for which they were substituted," the complainant would be entitled to the entire profit derived from the use of the whole machines unless the defendants, besides the use of said equivalents, made additions "which materially benefited the machines and in- "creased their effective power," and in this latter case, that the burden lay upon the defendants, not only "to show that *a* portion "of the profits was the result of the improvements which they an- "nexed," but also to furnish the "data from which the computa- "tion" could be made as to the *amount* of such portion, so that it could be reduced to dollars and cents. In other words, that it is not enough for a defendant to show that only part of the profits are due to the patented invention, but the burden also lies upon him to prove *what* part of the profits is not covered by such invention.

Undertaking to apply this line of reasoning to the facts of the case, the Court found that every feature in the machine, except that of the heated rolls acting as a mangle, was due to the Crosby & Kellogg invention and mere mechanical equivalents for the corresponding devices in the Crosby & Kellogg mechanism, for which they were substituted.

It is submitted that this conclusion is erroneous, both in fact and in law.

So far as the question of fact is concerned, it is not necessary to go into any minute examination of the mechanism and operation of the combinations covered by the *second* and *fourth* claims of the Crosby & Kellogg Patent, and the construction and operation of the defendants' machine. It is sufficient to say that it is manifest that the proposition that the defendants' machines, with the exception of the heated rolls, contained no feature or device contributing directly to the profits except those taken from the Crosby & Kellogg Patent,

or equivalents therefor, or mere incidentals thereto, is one not warranted by the testimony and inconsistent with admitted facts.

First. It was held by the United States Circuit Court for the Southern District of New York that the roller-pleating machines such as were used by the defendants embraced the primary and fundamental invention of Arnold covered by the Arnold reissue, and it is admitted that it would be impossible to employ the Crosby & Kellogg mechanism without using the said Arnold invention. This fact is not disputed either in the evidence or by the Court of Appeals, but it was urged in answer to it in argument, that the broad and sweeping claims of the reissue were invalid, and that the owners of the Arnold Patent abandoned the prosecution against the roller-pleating machines because, after the decision in *Miller vs. Bridgeport Brass Company,* it was deemed hopeless to attempt to maintain the validity of said reissue. This circumstance, it is submitted, is wholly immaterial. The decision of the United States Circuit Court that the roller-pleating machines fell under the reissue, and that the said reissue, as the law was then understood, was valid, necessarily involved an adjudication by the Court that, on an examination of the original and reissue, there was no claim in the reissue which the specification and drawing of the Arnold original patent would not have justified, if such claim had been made in the original. The old rule in respect to reissues, as enunciated by this court in *Seymour vs. Osborne*, 11 Wall., 542, is as follows (italics ours) :

" That the Commissioner of Patents may, on a reissue, allow the " patentee to redescribe his invention, and to include in the descrip- " tion and claims of the patent not only what was well described be- " fore, but whatever else was suggested or substantially indicated in " the specification or drawing which properly belonged to the *in-* " *vention as actually made and perfected.*"

The same doctrine was upheld in the Corn Planter Patent (23 Wall., 181).

This rule was subsequently modified, so that the law, as now understood, is, in substance, that the features of the original invention not claimed in the original specification, and not claimed thereafter before public rights have intervened, are to be regarded as dedicated to the public; and the mere fact that an invention is embodied in the mechanism described in the original specification and shown in

the drawings is not of itself sufficient to authorize its inclusion in a reissue.

But the decision which maintained the Arnold reissue and held that its broad claims included the roller-pleating machines was necessarily an adjudication that the mechanism first made by Arnold embodied a primary invention which was included in the Crosby & Kellogg invention, and the Crosby & Kellogg Patent, however original and valuable, was, nevertheless, in this sense, an improvement upon Arnold's, or, at most, a novel mechanism into which the Arnold invention entered and to which the Arnold invention necessarily contributed an important part of its value. Therefore, it is impossible to attribute the whole utility of the Crosby & Kellogg device to Crosby & Kellogg's invention. The Arnold invention must be regarded as an important factor in the complete machine.

Second. The same remarks apply to the Pipo Patent with this exception: The Pipo Patent is an improvement subsequent to Crosby & Kellogg and only relates to certain features relating to the pleating blade and its connections which first appeared in the Pipo mechanism, but were of a sufficiently inventive character to justify a patent.

Third. It is an admitted fact, and the Court finds, that the defendants' machines "were in their important parts constructed like "the machine described in the English Patent to James Orr of "November 4th, 1867, but which was never patented in this "country." This last fact is immaterial. If Orr had promptly applied for a patent in this country, there is no reason why his invention should not have been patented here as well as in England, and so far as the question of apportioning profits is concerned, whether the features derived from Orr were patented or not, if they contributed to the profit derived from the use of the machine, that part of the profit cannot be appropriated by Crosby & Kellogg. The evidence is undisputed that Orr was the first one to unite prior inventions and devices and mechanism, patented and unpatented, into an active organized machine to which the production of the mercantile pleatings made by the defendants' machines was due, and it is manifest that in doing this Orr exercised invention.

In a machine like those under consideration it may well be that it contains a number of features or devices all of which are essential to its operation, so that it could not do its work without each one of

them, and it may be quite true that the invention derived from Crosby & Kellogg is one of these essential features and as important as any, or, let it be admitted for the purposes of the argument, more important than any. But this fact does not justify the conclusion that everything outside the Crosby & Kellogg Patent, with the exception of the heated rolls, was merely the use of an equivalent for something found in that patent. For example, as noted in the petition, the rolls which performed the spacing operation, an important part of the process of pleating, are not the equivalent for the instrumentality employed for that purpose in the Crosby & Kellogg mechanism, for Judge WALLACE's decision necessarily implies directly the contrary. Nor can it be said in any just sense that the invention of Arnold and of Orr are mere equivalents for anything covered by the Crosby & Kellogg Patent, and especially are not mere equivalents for the devices of the *second* and *fourth* claims of the said Crosby & Kellogg Patent. The defendants' machine, in other words, is a new combination of old parts embracing some old devices, patented and unpatented, but it is not simply the Crosby & Kellogg device taken as an entirety, all the rest of the machines being merely equivalents or subordinate incidentals to the Crosby & Kellogg invention.

It follows from the above that it was erroneous to assume that the case was one in which the burden of proof lay upon the defendants to apportion the profits. As is pointed out in the petition, the burden has only been thrown upon the defendants where, as in the case of *Pavement Co. vs. City of Elizabeth*, 97 U. S., 126, and in the case of *Consolidated Valve Co. vs. Crosby Valve Co.*, 141 U. S., 441, the invention taken consisted of the entire thing, like the wooden pavement or the Richardson valve, and the facts raise no presumption that any features added by the defendants contributed anything to its salable value, its salable value being the measure of profits, and it was held that in such case, as is stated by the Court herein, the burden was then upon the defendants " to show that a " portion of the profits was a result of the improvement which they " annexed," but where, as in this case, it is clear and manifest, not only that a portion but a large portion of the profits is due to features not covered by the patent and where it is expressly admitted by the Court that so far as the heated rolls acting as a mangle embracing a large portion of the operation in producing the finished pleats, the profit is *not* due to the patented invention, it cannot be justly argued and no authority can be derived from the cases cited that the bur-

den of proof lies upon the defendants to make the apportionment and ascertain the amount. The rule that the burden lies upon the plaintiff to show the profits where it appears that only a part of the profits is due to his invention is universal. The amount of actual profits is a fact which the plaintiff must affirmatively establish. Says this Court in *Tilghman vs. Proctor*, 125 U. S., 136, 151 : "The plaintiff has the burden "of proving the amount of profits that the defendants have made by "the use of his invention," and it is only when, by showing, presumptively, that the whole profits belong to him, the plaintiff has shifted the burden upon the defendant to show that some part of the profit is not due to the plaintiff's invention, that the duty devolves upon the defendant of showing that the plaintiff is only entitled to part of the profits, and that there must be an apportionment. But when the *fact appears* whether, from the plaintiff's or the defendant's evidence, that there must be an apportionment, that the profits due to the invention are only part of the profits due to the use of an entire machine, the burden lies on the plaintiff to show to what part of the profits he is entitled.

Any other conclusion would be inconsistent with the rule that throws the burden upon the plaintiff of proving the amount of profits that the defendants have made by the use of his invention.

The position of the Court of Appeals upon this point appears to be this. It appeared from the evidence introduced by *plaintiff* and as part of his affirmative case in which he was seeking to prove the savings made by the defendants' machines that at least *one* most important part of the labor of making pleats by hand consisted in ironing out each pleat with a hot iron ; that the machine saved this labor ; that it saved this labor by devices contained therein which were not derived from the Crosby & Kellogg Patent, and were performed by parts of said machine not included in the elements composing the combinations of the *second* or *fourth* claims, or any equivalents therefor, and the Court itself held that, so far as the said machine saved the labor of the hot ironing, *that* saving could not be attributed to the Crosby & Kellogg invention, but was an additional saving to anything contributed to the machine by said Crosby & Kellogg Patent, and constituted no part of the actual profits which the plaintiff was entitled to recover.

Such being the plaintiff's case and the defendants being called upon to answer it, the Court held that the burden lay upon the *defendants* to make the apportionment and show what part of the

actual savings were due to the presence in the machine of features not covered by the Crosby & Kellogg Patent.

To do this in this case would have required the defendants : first, to prove by sufficient evidence the total cost of making and ironing out the pleats by hand, which the plaintiff had failed to do, and which must be proved, as the method had never actually been employed as a substitute for the work of the machine, by experimenting on a sufficiently large scale to furnish the required data, and then to ascertain what proportion of that cost was due to the labor of ironing out each pleat by hand. This practically threw upon the defendants the burden of proving the plaintiff's whole case; for the plaintiff, not having furnished any sufficient or satisfactory evidence by which to compute the whole saving effected by the machine, and having offered no evidence at all to apportion that saving between the features covered by the patent and those *not* covered by the patent, the Court thereupon decides that the *defendants*, because they have not supplied this deficiency in proof, must be held liable, and that their "*silence*" shows that they "must properly be charged with large profits."

In thus considering the position of the Court reference has only been made to the ironing part of the operation of the machine, because that is the feature which the Court expressly found was not covered by the plaintiff's patent. But it is to be remembered that the case is much stronger, because that important part of the process also, which consists in the regular *spacing*, was not performed in the defendants' machines by devices taken from the Crosby & Kellogg Patent, one of the chief advantages of said machines being, as stated by complainant's witness, A. E. Kursheedt, that in their product "the space between the plaits is perfect, * * * being always "the same" (Rec., p. 150, 36 x-Q.).

Nor is any notice taken of other devices in the machine due to other inventors and notably Orr.

All these greatly enhance the *proportion* of the savings *not* due to the Crosby & Kellogg Patent, but the principle is the same whether that proportion be larger or smaller, and so long as it is admitted and found, as it is in this case, that a proportion of the savings "of pecuniary importance and benefit" is *not* due to the plaintiff's patent the rule of *Garretson vs. Clark*, 111 U. S., 120, applies, and the burden lies upon the plaintiff to show the actual profits derived from the use of his invention.

If it be suggested that the rule of *Garretson vs. Clark* only applies to an "improvement," and that the whole structure covered by the Crosby & Kellogg Patent constitutes a complete machine, the answer is, *first*, that it can make no difference in the application of the rule whether the invention is an improvement or not, if it is united in a combined structure of which it only forms a part, and to which it only contributes a part of the profits. An improvement implies such a combination, for it implies that the use of the invention necessarily involves the use of what was old, but it is manifest that even if the thing invented is entirely novel, and of a primary character, yet if it only forms part of a larger structure involving other distinct devices contributing to the profit, the owner of the patent cannot lay claim to the whole. The owner of a primary invention is no more entitled to profits not arising from its use than the owner of an invention for a mere improvement. Next, and, as a further answer, the combination of the *second* and *fourth* claims of the Crosby & Kellogg Patent do not make an entire machine: are not capable of producing a complete pleat, and are only used as part of a later invented and differently organized machine from that of Crosby & Kellogg, and one capable of doing work that the Crosby & Kellogg machine is incapable of doing, and that work of the sort which created the whole business from which the profits in dispute were derived. Under these circumstances, it is immaterial whether the Crosby & Kellogg invention be regarded as an improvement or a new departure, it did not contribute the whole but only a portion of the profits derived from the use of said roller-pleating machine, and, therefore, the burden lay upon the plaintiff to prove the proportion which it *did* contribute to the profits so derived.

IV.

Counsel is well aware that in *Suffolk Company vs. Hayden* (3 Wall., 315) it was held that in proving damages in an action at law, where there was no license fee in the case, "general evidence must "necessarily be resorted to," "to get at a fair measure of damages," and that evidence of the utility and advantage of the invention over the old modes or devices that had been used for working out similar

results was pertinent evidence for that purpose. This decision did not turn upon or discuss the question of the kind or degree of general evidence which would be sufficient to furnish the basis for computing the savings made by the use of the invention, nor does the report show to what extent the evidence in that case afforded such a basis. The question before the Court arose upon an exception to the charge of the Judge at the trial, and the error assigned was "that the value of the improvement was not a proper matter for the "jury to consider when making their estimate of damages." No question was raised that the evidence to prove that value was insufficient or conjectural, and the decision of the Court must be read in the light of the error assigned.

Suffolk vs. Hayden was not intended to change the law that any evidence to afford support for a finding of profits must be sufficiently full and definite to furnish data for calculating profits. It was not intended to decide that if general facts were proved showing that the invention was valuable a jury might fix that value at any sum they chose.

From the beginning, the rule has required that the proof of damages or profits should be definite and not leave their amount to be determined by unreliable speculations or mere inference and conjecture. In *Ransom vs. The Mayor*, 23 How., 487, it is said:

"Actual damages must be calculated not imagined, and an "arithmetical calculation cannot be made without *certain* data on "which to make it" (italics in original.)

And, further, in the same case, citing from Seymour vs. McCormick (16 How., 485), "actual damages should be actually proved, "and cannot be assumed as a legal inference from facts which "afford no data from which they can be calculated."

In the late case of *Cassidy vs. Hunt*, 75 Fed. Rep., 1012, in the United States Circuit Court for the District of California, in which the cases are reviewed, including the decision by the Circuit Court of Appeals for the Ninth Circuit (64 Fed. Rep., 585), and in which it is held that in an action at law a jury may find from general evidence a reasonable royalty for the use of the invention, Judge McKenna says, concerning the character of such evidence in order to be sufficient:

"As to the proof, all the cases affirm that it must be certain, not "conjectural; such as a conclusion could be deduced from, not "guessed at."

But in this case, as already stated, there is no evidence which upon any theory warrants the conclusion that defendants saved forty thousand dollars by reason of the presence in their machines of the combinations of the *second* and *fourth* claims of the Crosby & Kellogg Patent.

That conclusion cannot be sustained upon the plaintiff's theory, and the only one upon which he claimed or attempted to prove profits, namely, the difference in cost, or a proportionate amount of the difference in cost between making the pleats on the machine and folding and ironing them out by hand, because there is no sufficient evidence of the whole cost of so folding and ironing out the pleats by hand and no evidence whatever as to the proportionate amount of that cost saved by the use of the machine and due to the presence therein of the *second* and *fourth* claims of the Crosby & Kellogg mechanism.

And there is not even any evidence that said method of ironing out pleats by hand would serve as a substitute for pleating the goods for which said machines were used by the defendants, but the contrary.

There is no other proof of profits whatever, nor any attempt to prove profits, except the difference of cost in production, as above stated.

There is no proof or attempt to prove the profit received by the defendants from the sale of the pleatings as part of the trimmings of ladies' dresses.

There is no "general" evidence that would justify a finding of forty thousand dollars. The plaintiff waived damages; that is, he did not undertake to prove any loss to the Elm City Company which is represented as trustee in insolvency, from interference with its business or loss of license fees, or in any other way. He did not offer any general evidence of the value of the invention sufficiently definite to afford the slightest basis of calculation, and seek to recover a sum representing such value as damages on the theory of *Suffolk Co. vs. Hayden* and *Cassiday vs. Hunt*, above noted. Mere statements that the Crosby & Kellogg Patent disclosed a "pioneer" invention of primary character and was the first attachment which made regular pleats as distinguished from gathers affords no data from which the value of the use of the defendants' machines can be calculated. The only general evidence bearing upon the value of the invention as used in the defendants' machines was that offered by the defendants, and it was offered by them in order to

show that the plaintiff had the means, if he chose, of proving a reasonable sum as damages. The licenses, which the defendants were able to discover, granted to those using the same, or a greater number of roller pleater machines than the defendants, ran from $800 to $1,000 for the last eighteen months of the patent, including a release for all past use. The period covered by the accounting was a little over five years. It appeared that the owners of the Arnold Patent asked $500 per annum to those situated like the defendants for the use of the Arnold invention in the roller-pleater machines, from all which facts it might be inferred that five hundred dollars a year would have been a proper sum at which to value the use of the Crosby & Kellogg invention as one of the constituents of the defendants' machines.

But this was all cast aside. The plaintiff, or rather Wooster, who, on a speculative agreement (see Rec., pp. 60, 62), is prosecuting the suit in the plaintiff's name, abandoned all claim for damages, abandoned any theory of recovering the reasonable value of the use of the invention either as damages or profits, abandoned any attempt to prove the profit made by the defendants from the sales of the pleatings, and chose to stand on the alleged difference in cost between the use of the machine and the use of a method of hand-pleating, the cost of which as he sought to prove by vague and unreliable estimates, would be so great as to be prohibitory and afford the basis for an enormous recovery. He has chosen to stand on this last alone. No evidence is offered to prove profits upon any other theory, and the decision of the Circuit Court of Appeals turns entirely upon the questions arising upon the proof by means of which the plaintiff endeavored to sustain this contention.

For the reasons already given, it is submitted that the award of the Court of Appeals cannot be lawfully maintained.

The petition passes over the fact that after the decision by the Court of Appeals, a review of which is sought in these proceedings, the defendants proceeded to make experiments in ironing out pleats by hand, the result of which was such that they moved the Court to send the case back to the Master, offering to prove that pleatings could be ironed out by hand so as to produce substantially the result of machine-made pleatings at a very small cost over the cost of pleating by the machine.

The motion was made on the ground that, as defendants' counsel understood the law, the evidence introduced by the plaintiff, on the accounting, did not call upon the defendants to search for and produce such evidence, and it had not accordingly been done. The Court of Appeals refused this application on the ground that no new law was announced in the decision as to the burden of proof, and the defendants should have offered such evidence before.

This ruling was discretionary with the Court of Appeals and not the subject of review, and neither that nor the affidavits in support or in opposition to said motion can be properly considered in this proceeding.

Nor is it deemed material to discuss the question of the propriety of the Court ascertaining profits instead of sending the case back to the Master, or the effect thereon of the delays in the case, due to the plaintiff's omission to prosecute, or any considerations arising from the fact that it appears from the record that the suit is a suit prosecuted under a speculative agreement, and one in which, apparently, the plaintiff has no interest (Rec., pp. 60, 62) (for it appears that nothin gwas received from the Pipo suit [Rec., p. 172, 58 x-Q., 59 x-Q.]), and was delayed, while the defendants were innocently using the machines for some five years, and until the patent had less than a year and a half to run. All these matters have no bearing upon any question presented by this proceeding, and only affect the discretionary action of the Court of Appeals.

The only questions which have led the petitioners to invoke the intervention of this Court and pray for a review of the decision of the Circuit Court of Appeals are those presented by the record which was before that Court when said decision was made, and upon which, alone, if was founded.

Whether or not said decision does not incorrectly apply the law in regard to the burden of proof is one of those raised by this petition and which this Honorable Court is asked to decide.

The patent laws belong exclusively to the jurisdiction of the United States Courts and the appeal to the Supreme Court in those cases was given in order that questions of the application and interpretation of those laws might be settled by the high court of the nation. This was necessary because a patent is an exclusive right which extends throughout the whole territory of the United States,

and it is of the highest importance that a private right affecting the whole people should be interpreted and its enforcement have the sanction and authority of a Court whose decisions are binding upon the whole people.

The present case, it is submitted, raises questions of the proper interpretation of the rules of law and evidence in regard to recoveries of profits, which calls for the intervention of this Court to clear up the extreme doubt which the decision in *Tuttle vs. Claflin* has caused. If that decision is erroneous it should not be allowed to stand. It is of moment to know whether the principles which have hitherto been enunciated justify the rendition of such a judgment for profits as has been rendered in this case.

The points involved do not turn upon questions of fact, or involve any examination of intricate mechanism, or of a great body of testimony. They are questions raised by admitted facts, or upon undisputed evidence or the findings of the Court itself.

If the views here presented are sound, not only have the defendants suffered a great wrong by the judgment given against them, but it is of public interest that that wrong should be redressed, and it is earnestly hoped that this Court may deem this a case in which the petitioners' prayer should be granted.

EDMUND WETMORE,
Counsel for Petitioners.

CHARLES W. GOULD,
Of Counsel.

Office Supreme Court, U. S.
FILED
MAR 29 1897
JAMES H. McKENNEY,
CLERK.

166-721
763

IN THE

Supreme Court of the United States.

Ex parte

JOHN CLAFLIN, as Executor of Horace B. Claflin, deceased;
JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER FORCE and DANIEL ROBINSON,

Defendants.

SUPPLEMENT TO BRIEF.

EDMUND WETMORE,
CHARLES W. GOULD,
Counsel for Petitioners.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

In the Supreme Court of the United States.

Ex parte

JOHN CLAFLIN, as Executor of Horace B. Claflin, deceased; JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER FORCE and DANIEL ROBINSON, Defendants.

Supplement to Brief.

After the decision of the Circuit Court of Appeals in the case of *Tuttle vs. Claflin*, experiments were made by defendants in order to obtain specimens of the result of making the pleats and ironing out each pleat by hand. It was found that using the same materials that had been used on the machines (linens and percales) and pleating and ironing them out by hand, it produced a result substantially the same as that produced by the machine at a cost of not more than a quarter or half a cent greater than the cost of making the pleats on the machines, and that the conjectures of the plaintiff's witnesses as to the cost of this sort of work and also their statements as to its character were inaccurate and could be disproved.

For reasons already set forth in the main brief herein, these experiments had not been made before, and no evidence had been introduced on the point because of the complete belief on the part of defendants' counsel that the plaintiffs' evidence did not call upon them to ascertain and prove the cost of hand pleating which the plaintiff had failed to prove, or to investigate, and, if possible, disprove, the plaintiff's allegations as to its insufficiency. Upon sufficiently verifying the accuracy of the defendants' before-mentioned experiments by the production of a number of yards of the pleating, a motion was made before the Circuit Court of Appeals to so modify the decree as to send it back to the Master. This motion

was denied. The opinion of the Court denying the same being as follows:

"SHIPMAN, C. J.: The defendants have moved that the decision "upon this appeal be modified by directing that the case should be "returned to the Master for further evidence in regard to the cost "of hand-made plaits, upon the ground that it has been ascertained "by experiments that the cost of linen plaits made and ironed by "hand of as marketable a quality as those made upon a machine "would not have exceeded one cent per yard.

"The counsel for the defendant states that this class of tes- "timony was not deemed by him of importance upon the hearing "before the Master, because the complainant's testimony was to the "effect that hand-made pleats could not, in any event, compete "with machine-made pleatings, on account of the inferiority of "hand-made work. We think that the counsel construed the tes- "timony too literally. The witnesses were introduced for the pur- "pose of proving the cost of hand-made linen and woolen plaitings, "and their testimony related to the salable or merchantable character "of the goods as they ordinarily could be presented by hand, and "that linen and percale goods could not commercially compete with "machine-made goods without an excessive expense. They went "further than this, and said that hand-made goods of linen could "not be manufactured at any cost to compete, in quality, with the "same kind of plaitings made by machinery, while one of these "witnesses also said that he could not make narrow plaits in "woolen goods so as to give satisfaction. This latter class of tes- "mony was not true, as was shown by the defendant's witness, Mrs. "Smith; and, indeed, it must have been well known that silk and "woolen goods were, as a rule, hand plaited in preference to run- "ning them through a machine.

"The defendants were represented upon the hearing before the "Master by Mr. Asahel K. Smith, the superintendent of their manu- "facturing department, who asked his wife, under whose supervision "the defendants' plaiting was made from the latter part of 1876 to "the first part of 1880, to make experiments upon the subject of the "cost of hand-made goods. Her experience made her an intelligent "witness in regard to plaitings, and she made an experiment, but of "so brief a character as to be of very little moment. The attempt of "Mr. Smith to present information to the master upon the subject "of profits stopped with this testimony. Mrs. Smith, however, also "testified that the goods that were plaited upon the machines could "be plaited by hand; that she did not know the actual expense of "plaiting fine goods by hand because no separate account was made "of it; that silk and dress goods and woolen goods were generally

" hand plaited at the complainants' factory during 1876, and subse-
" quently because the work upon fine goods was done better by
" hand than through a machine ; that the character of the material
" made a difference between the results by hand plaiting and of ma-
" chine plaiting, and that hand-made plaiting was sufficiently uni-
" form for the ornamental uses to which the articles were put.

" The questions of expense and of the proper standard of com-
" parison for the purpose of an estimate of profits went to the mas-
" ter upon the testimony which the parties thus chose to give. The
" actual history of the manufacture fully justified the finding that, in
" estimating the profits gained by the use of the patented machines,
" the proper and the only proper standard of comparison was the
" expense of making the like articles by hand. In determining the
" amount of profits, his estimates were based upon the only figures
" which the parties chose to give him.

" The defendants now say by Mr. A. K. Smith, the same person
" who was silent before the Master, that, ' with the apparatus that
" ' we had in our employ during the time covered by the accounting,
' ' it would have been entirely possible to have made by hand all of
" ' the pleatings which we made by machine and to supply our trade
" ' without any delay. At the rate of wages we then paid, and care-
" ' fully following the work step by step, I am able to say positively
" ' that the cost of the hand-pleating and ironing each pleat out so
" ' as to produce the result shown by the specimens above referred
" ' to, would not have exceeded one cent a yard. A more accurate
" ' estimate would show about three-quarters of a cent, but it is cer-
" ' tain that it would not have exceeded one cent a yard, and at that
" ' cost we could have furnished pleatings upon all the goods which
" ' we made and sold during the said period.'

" We do not doubt that the exhibits were made in the presence
" of Mr. Wetmore in the time that he states, and as they are now
" presented ; but the question is that of the cost of manufacture
" upon a commercial scale. The new information which Mr. Smith
" has obtained is not in harmony with his silence when he was also
" the representative of his employers, and when cost was an im-
" portant feature of the case. His single affidavit, made as the re-
" sult of a short test by the work people whom he employed, that
" linen pleatings can be made at one cent per yard is not adequate
" to satisfy a Court that justice towards a losing party requires a re-
" hearing.

" Turning to the question whether under any state of facts it
" would be the more proper course to send back the case to the
" master, in the hope that another investigation might turn estimates
" into mathematical accuracy, it is to be recollected that this

" case is by reason of its history both remarkable and " unique. The interlocutory decree was dated in March " 1884, and the master's report was dated August 24, 1893, and re- " lated to an industry which, as an active industry, died in 1879 or " 1880. As the case presented itself before the master, large profits " had been undeniably made. This court thought that too little " account had been taken of two subjects which would reduce the " sums found by the master, but that if the case should be sent back " the result would be another prolonged hearing, necessarily based " upon estimates by the experts on both sides for the time when " facts could be ascertained, which were based upon the experience " of actual manufacturers, had been suffered to pass by. No new " rule of law was announced in regard to the burden of proof, or in " regard to the necessity that the complainant should, in the cases " which ordinarily come before the master, satisfy him by affirmative " evidence of the amount of profits. The court was of opinion that " justice to the defendants required a reduction of the amount which " had been apparently made out by the testimony, and that for the " purpose of bringing to a close a litigation, which, by its delays " had become discreditable, it was desirable that the court should " take the responsibility of making a decision modifying the amount " found by the master to such an extent that the defendants should " have no cause of complaint.

" The motion is denied."

As the granting or refusal of the motion to send the case back to the Master was purely discretionary with the Court, and as the only record by which the decision, which it is sought to review by this proceeding, can be judged, is the record upon which that decision was rendered, the proceedings upon the said motion to send the case back to the Master are not relevant to this application, but it is, perhaps, proper that some comment should be made upon the statement by the Court therein contained bearing upon the original decision.

The first statement in the case that the plaintiff's evidence, to the effect that hand-made pleatings could not, in any event, compete with machine-made pleatings, were taken too literally by counsel, it is respectfully submitted, is not a just criticism.

The testimony is entirely clear and can have no other than its literal meaning. The testimony has already been cited in the main brief in support of this application, and speaks for itself. The statement of Wooster, the witness referred to in the opinion of the Court, that hand-made goods of " linen " could not be manufactured at any cost to compete in quality with the same kind of pleatings made by machine, related expressly, not only to linen, but to percale, and in-

cluded seven-eighths of the goods pleated by the defendants on their appeal.

Rec., p. 77, 11 Q.

The opinion further referred to the statement of Mr. Kursheedt that he could not make narrow pleats in woolen goods so as to give satisfaction, and proceeds to say that "this latter class of testimony "was not true, as was shown by the defendants' witness Mrs. Smith."

This is an error. The defendants' witness, Mrs. Smith, did not testify to the making of narrow pleats in woolen, and the statement ignores the fact that Mrs. Smith's testimony did not refer to *ironed-out* pleats, and while it may have been, and was possible, to pleat silk and some woolen goods by means of the sewing machine by hand manipulation only and without ironing, it is submitted that it is wholly unfair to say that, on the one hand, unironed pleatings were perfectly feasible and should be received as truth of the fact that hand pleatings could be made as efficient as by the machine, and on the other hand to charge the the defendants as a standard of comparison with hand pleating, which necessitated the ironing out of each pleat. Nor in any part of Mrs. Smith's testimony in relation to the pleatings to which she referred and was described by her at page 104 was there any statement or suggestion of ironing, and her estimate of cost was merely that of the manipulation in the sewing machine. If unironed pleatings are to be taken as the standard of hand labor, then there was no foundation for finding $40,000 difference in cost. The point made by the plaintiff was that the linens and percales, which could not be pleated without ironing, could not be finished by hand for that very reason with sufficient regularity to make them merchantable. The learned Court says that the questions of expense "and of the proper standard of "comparison for the purpose of an estimate of profits, went to the "Master upon the testimony which the parties chose to give" and that in determining the amount of profits the Master's estimates "were based upon the only figures which the parties chose to "give."

This, of course, implies that it was the duty of the defendants, in view of the testimony given by the plaintiff, to have made the necessary experiments and to have proved with accuracy the cost of hand-pleating linen and percale goods. The petitioners submit that this is an error, and that, for the reasons set forth at length in the main brief, the defendants were not called upon to assume a burden of proof which, under the rules of law, the plaintiff's evidence in this case did not throw upon them. The defendants were neither obliged to prove, first, the total amount of difference between pleat-

ing and ironing out linen and percales by hand and by machine, and, secondly, to apportion this difference so as to ascertain what were the actual profits due to the plaintiff, and what were those for which he could not recover. This remark also applies to the comments on the testimony of Mr. Smith. He stated—what was perfectly true—that Claflin & Company could not have afforded to have made pleatings at the prices which the plaintiff's witnesses conjectured it would cost. The learned Court below seemed to think that every presumption was to be made against the defendants and against this testimony, because Mr. Smith did not proceed to state at what cost of hand pleatings, it would have been possible to make and sell them and to have proved what the plaintiff certainly did not prove—namely, that linens and percales could have been made and each pleat ironed out by hand and still have competed with machine-made goods. All of this the defendants were not called upon to prove by Mr. Smith or any one else unless the rule as to the burden of proof was correctly applied by the Court of Appeals, which is the very question upon which the judgment of this Court is prayed.

The reference by the learned Court to the delay in the case can scarcely be applied to the defendants. The question has, perhaps, no bearing upon the present application, but it is proper to say that the only party whose position can be criticised is the plaintiff. It appears from the record that the suit was brought when the patent had but a short time to run and after Claflin & Company had been using the plaiting machines in ignorance of any claims made against them; that it was prosecuted in the name of Tuttle as Trustee in insolvency, under a purely speculative agreement contained at page 62 of the record; that it appears that this suit has been prosecuted by Wooster, who has a half interest in the recovery at his own expense (Rec., p. 60), and that one Lewis claims to be the absolute owner of the other half, the actual parties in interest apparently using the name of an assignee in insolvency to prosecute a claim solely for the purpose of collecting as large a sum as possible out of the defendants, the whole circumstances presenting a case which does not favorably recommend itself to the Court.

Reference is also made in the main brief to the fact that it appeared during the life of the Arnold reissue roller-pleating machines like the defendants were licensed under that patent for a fee of five hundred dollars. It cannot be claimed that this was any evidence of apportionment in this case, because the Circuit Court of Appeals expressly threw out the Arnold Patent and attributed

no part of the profits to that invention. Whether it can be accepted in any case as a part of the evidence of apportionment does not touch the question raised by the petition. The point upon which it is sought to obtain the opinion of this Court is the decision of the learned Court below—that the facts in this case threw the burden upon the defendants to make the apportionment, and, as the Court threw out the Arnold Patent, there was absolutely no evidence whatever in the case to support the apportionment, if it be deemed an apportionment, which assesses the profits at forty thousand dollars.

EDWARD WETMORE,
CHARLES W. GOULD,
Counsel for Petitioners.

MAR 29 1897
JAMES H. McKENNEY,
CLERK.

763

IN THE

Supreme Court of the United States.

October Term, 1896.

Ex parte JOHN CLAFLIN, as Executor, etc., *et al.*,
Petitioners.

Brief in Opposition to Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

BENJAMIN F. LEE,
Of Counsel for Respondent.

In the Supreme Court of the United States,

OCTOBER TERM, 1896.

Ex parte JOHN CLAFLIN, as Executor of HORACE B. CLAFLIN, deceased; JOHN CLAFLIN, EDWARD E. EAMES, HORACE J. FAIRCHILD, DEXTER N. FORCE and DANIEL ROBINSON, Petitioners. } No.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT TO REVIEW THE CASE OF THEODORE A. TUTTLE, AS TRUSTEE IN INSOLVENCY, VS. JOHN CLAFLIN, AS EXECUTOR OF HORACE B. CLAFLIN, DECEASED, ET AL.

This is a petition to review by writ of *certiorari*, a final decree of the Circuit Court of Appeals for the Second Circuit, which reversed a decree of the Circuit Court of the United States, for the Southern District of New York, with costs, in favor of the complainant, and decreed that the mandate of said Court issue to the said Circuit Court, directing it to enter a decree declaring the validity and the infringement by the de-

fendants of the second and fourth claims of the Crosby and Kellogg patent, and adjudging that the complainant recover from the defendants the sum of forty thousand dollars as their profits, with interest thereon from the 29th day of July, 1896, being the date of the filing of the decision of said Court fixing said profits at said sum and the costs in the Circuit Court to be taxed.

This suit was brought for infringement of letters patent of the United States, dated December 2, 1862, No. 37,033, granted to Chauncey O. Crosby and Henry Kellogg, for a new and useful machine for frilling or crimping muslin, linen and other textile materials (Rec., p. 359).

The bill was filed by Theodore A. Tuttle, as Trustee in insolvency of the Elm City Company, against Horace B. Claflin and others, then composing the firm of H. B. Claflin and Company.

The following are the dates of the principal events in the cause:

1878, August 1. Bill filed.

1878, October 7. Answer filed.

1878, November 18. Order for preliminary injunction made by Judge Blatchford.

1878, December 20. Replication filed.

(1879, December 2. Patent in suit expired.)

1884, March 10. Decision by Judge Wallace in favor of complainant, on the second and fourth claims of the patent.

1884, April 3. Interlocutory decree of reference as to profits and damages.

1893, August 26. Report of George F. Betts, Esq., Special Master, awarding $76,215.85 profits, in favor of complainant, filed.

1894, March 15. Decision of Judge Coxe sustaining certain exceptions to the Master's Report.

1894, April 10. Decree awarding to the complainant no profits and six cents damages.

1896, February 17. Cause argued on cross appeals before Justice Peckham, and Circuit Judges Lacombe and Shipman.

1896, July 29. Decision of Circuit Court of Appeals reversing decree of the Circuit Court, and directing decree in favor of the complainant for $40,000 and costs.

1896, December 7. Motion on behalf of defendants to modify decision and refer cause back to Master for further proofs, argued.

1896, December 7. Motion on behalf of defendants to dismiss the appeal, argued.

1897, February 23. Decision denying both motions.

1897, February 25. Order denying both motions.

1897, February 25. Final decree.

1897, March 26. Mandate issued.

1897, March 27. Final decree, made and entered in Circuit Court in obedience to Mandate.

We call the attention of the Court to a statement contained on page 2 of the Brief for Petitioners, where it says:

"That the case raises the foregoing questions appears from a brief summary of facts concerning which there is no dispute."

We do not admit the correctness of this statement, but consider that the facts in the case are very inadequately and incorrectly set forth in the brief.

I.

THIS IS NOT A PROPER CASE FOR A WRIT OF CERTIORARI.

In American Construction Company *vs.* Jacksonville, Tampa and Key West Railway Company (148 U. S., 372), the Court, speaking by Mr. Justice GRAY, says (pp. 383, 384):

"In the same spirit, the authority conferred on this Court by the very provision on which the petitioners mainly rely, by which it is enacted that 'in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court,' has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. *Lau Ow Bew's Case*, 141 U. S., 583, and 144 U. S., 47; *In re Woods*, 143 U. S., 202. Accordingly, while there have been many applications to this Court for writs of *certiorari* to the Circuit Court of Appeals under this provision, two only have been granted; the one in *Lau Ow Bew's case*, above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in *Fabre Petitioner*, No. 1237 of the present term, an admiralty case, which presented an important question as to the rules of navigation, and in which the decree of the Circuit Court of Appeals for the Second Circuit reversed a decree of the District Judge, and was dissented from by one of the three Circuit Judges; and in each of those cases the Circuit Court of Appeals had declined to certify the question to this Court."

The patent expired over seventeen years ago—on

December 2, 1879. The Statute of Limitations has long prevented the possibility of any action being brought upon it. The invention has passed into the public domain, and the construction of the patent is no longer of the least public interest.

The opinions of the Circuit Court of Appeals (77 O. G., 973 and 78 O. G., 1739) announce no new rule of law, and are taken up principally with the discussion of questions of fact. The place of the invention in the art was a pure question of fact, and the ruling of the Court was that it was a "pioneer invention." The other questions of fact discussed in the opinions relate wholly to the computation of profits and discussion of the evidence before the Master relating to this subject. In reducing the recovery awarded by the Master, the Circuit Court of Appeals did no more than is constantly done by an appellate tribunal where a case is brought before it by writ of error. It frequently happens that while the Appellate Court is of opinion that a verdict of a jury is supported by the evidence, yet the Court considers it best to reduce the amount of the judgment, in order to avoid any possible injustice to the defendant. Even if the reduction made by the Circuit Court of Appeals of the amount awarded by the Master, be regarded as an independent estimate, it is fully justified by the action of this Court in Mfg. Co., *vs.* Cowing (105 U. S. 253, 257).

The Circuit Court of Appeals, in the opinion filed February 23, 1897, (78 O. G., 1740), says:

"Turning to the question whether, under any state of facts, it would be the more proper course to send back the case to the master, in the hope that another investigation might turn estimates into mathematical accuracy, it is to be recollected that this case is, by reason of its history, both remarkable and unique. The interlocutory decree was dated in March, 1884, and

the master's report was dated August 24th, 1893, and related to an industry which, as an active industry, died in 1879 or 1880. As the case presented itself before the master large profits had been undeniably made. This Court thought that too little account had been taken of two subjects which would reduce the sums found by the master, but that if the case should be sent back the result would be another prolonged hearing necessarily based upon estimates by the experts on both sides, for the time when facts could be ascertained which were based upon the experience of actual manufacturers had been suffered to pass by. No new rule of law was announced in regard to the burden of proof or in regard to the necessity that the complainant should, in the cases which ordinarily come before the master, satisfy him by affirmative evidence of the amount of profits. The Court was of opinion that justice to the defendants required a reduction of the amount which had been apparently made out by the testimony, and that for the purpose of bringing to a close a litigation which by its delays had become discreditable it was desirable that the Court should take the responsibility of making a decision, modifying the amount found by the master to such an extent that the defendants should have no cause of complaint. The motion is denied."

II.

EVEN IF THIS WERE A CASE PROPER FOR THE EXERCISE OF THE EXTRAORDINARY JURISDICTION INVOKED BY THE PETITIONER, THE PETITION SHOULD BE DENIED.

All of the questions presented by the petition and by the brief filed on behalf of the petitioner, were fully discussed before the United States Circuit Court of Appeals. The notice of this motion returnable

this 29th day of March, 1897, was served upon respondent's counsel on March 23, 1897, at 4:25 P. M., accompanied by a printed copy of the Petition and of the Brief on behalf of the Petitioner. In view of the short time intervening between the notice and the submission of this matter, it has, of course, been impracticable to prepare a new brief upon the merits. We have, therefore, contented ourselves with the following short statement, supplementing the same by references to the Brief for the Complainant and Appellant and the Brief for the Complainant and Appellee, filed in the Circuit Court of Appeals, on the appeal and cross appeal. We are able to present to the Court a sufficient number of these copies for the use of the Justices.

1. In the twelfth paragraph of the petition (p. 17) are certain statements, founded upon the requirements of Sec. 4900 of the Revised Statutes, requiring goods to be marked "patented," with the date of the patent, and involving a question of pleading. This matter, however, is not found among the assignments of error contained in the petition (pp. 18–32), nor is it referred to at all in the brief on behalf of the petitioner, and we presume therefore that it does not require any notice on our part. This matter is fully dealt with in the opionion of the Circuit Court of Appeals, filed July 29, 1896 (77 O. G., 978), and is also fully treated in the Brief for Complainant and Appellee (red cover), pp. 7 to 32, and in the Brief for Complainant and Appellant (gold cover), on pp. 55 to 60, filed in the Circuit Court of Appeals.

2. The invention covered by the claims in controversy was a "Pioneer Invention."

This matter is fully dealt with in the opinion of the Circuit Court of Appeals, filed July 29, 1896 (77 O. G.,

pp. 974, col. 2 to 976, col. 1), and is also fully treated in the Brief for Complainant and Appellant (gold cover) on pp. 2 to 16, 44 to 46 (Master's Report), 60 to 78, 82 to 108, and in the Brief for Complainant and Appellee (red cover) on pages 1 to 7, filed in the Circuit Court of Appeals.

3. The mode of estimating the profits adopted by the Circuit Court of Appeals was a correct one.

This matter is fully dealt with in the opinion of the Circuit Court of Appeals, filed February 23, 1897 (78 O. G., pp. 1739, 1740), and also in the opinion filed July 29, 1896 (77 O. G., 976, col. 1, to 978, col. 1), and is also fully treated in the Brief for Complainant and Appellant (gold cover), on pp. 2 to 4, 19, 25, 26, 29 to 46, 81, 82, 85, 108 to 150.

III.

THE PETITION SHOULD BE DISMISSED. IF, HOWEVER, IT IS GRANTED, LEAVE SHOULD BE GIVEN TO THE COMPLAINANT TO JOIN IN PROCEEDINGS UNDER THE SAME IN THE NATURE OF A CROSS APPEAL, TO THE END THAT THIS COURT MAY REVERSE OR MODIFY THE DECREE OF THE CIRCUIT COURT OF APPEALS, AND AWARD TO THE COMPLAINANT A LARGER SUM THAN WAS AWARDED TO HIM BY THE FINAL DECREE OF SAID COURT, AND MAY CONFIRM THE SAID MASTER' REPORT AND AWARD TO THE COMPLAINANT THE SUM OF $76,215.85, WITH INTEREST THEREON FROM THE 26TH DAY OF AUGUST, 1893, THE DATE OF THE FILING OF THE MASTER'S REPORT.

BENJAMIN F. LEE,
Of Counsel.